

James H. Weingarten, DC Bar No. 985070
Peggy Bayer Femenella, DC Bar No. 472770
James Abell, DC Bar No. 990773
Cem Akleman, FL Bar No. 107666
Meredith R. Levert, DC Bar No. 498245
Jennifer Fleury, NY Bar No. 5053178
James Gossmann, DC Bar No. 1048904
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Tel: (202) 326-3570
jweingarten@ftc.gov; pbayer@ftc.gov;
jabell@ftc.gov; cakleman@ftc.gov;
jfleury@ftc.gov; mlevert@ftc.gov;
jgossmann@ftc.gov

Erika Wodinsky, Cal. Bar No. 091700
90 7th Street, Suite 14-300
San Francisco, CA 94103
Tel: (415) 848-5190
ewodinsky@ftc.gov

[Additional counsel identified on signature page in accordance with Local Rule 3-4(a)(1)]

Attorneys for Plaintiff Federal Trade Commission

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

MICROSOFT CORP.

and

ACTIVISION BLIZZARD, INC.,

Defendants.

Case No. 3:23-cv-2880

**PLAINTIFF FEDERAL TRADE
COMMISSION'S INITIAL PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

CONFIDENTIAL

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I. BACKGROUND

1. Through an “Agreement and Plan of Merger” dated January 18, 2022, Microsoft Corp. (“Microsoft”) proposes to acquire Activision Blizzard, Inc. (“Activision”) (the “Acquisition”), for approximately \$68.7 billion. PX0083 at 1 (Agreement); PX9050 at 25 (Microsoft 10-K 2022).
2. Defendant Microsoft is a publicly traded company organized under the laws of Delaware and is headquartered in Redmond, Washington. PX0083 at 5 (Agreement); PX9050 at 1 (Microsoft 10-K 2022).
3. Microsoft made \$198 billion in revenue in 2022. PX9050 at 43 (Microsoft 10-K 2022).
4. Gaming is part of Microsoft’s More Personal Computing division. PX9050 at 1 (Microsoft 10-K 2022).
5. Microsoft’s gaming business includes Xbox, Xbox Game Pass (a gaming subscription service) and Xbox Cloud Gaming. PX9050 at 14 (Microsoft 10-K 2022).
6. Defendant Activision is a publicly traded company organized under the laws of Delaware and headquartered in Los Angeles, California. PX0083 at 5 (Agreement); PX9388 at 33 (Activision 10-K 2022).
7. Activision earned \$7.5 billion in revenue in 2022. PX9388 at 40 (Activision 10-K 2022).
8. During the last three years, three Activision franchises, Call of Duty, Warcraft, and Candy Crush, accounted for approximately 80% of its revenue. PX9388 at 10 (Activision 10-K 2022).

A. Gaming is the Largest Category in the Entertainment Industry, and It Continues to Grow

9. Today, the gaming industry has over three billion players worldwide, with revenues larger than the film, music, and print industries. PX1777 at 33. (Spencer, Nadella, and Bond (Microsoft) deposition exhibit).
10. Gaming is the fastest growing form of media and entertainment, and it is expected to reach over 4.5 billion gamers by 2030. PX1785 at 9 (Spencer (Microsoft) deposition exhibit).

- 1 11. In 2021, one in three people in the world played video games. PX1777 at 32 (Spencer,
2 Nadella, Bond (Microsoft) deposition exhibit).
- 3 12. Video games can be played on different devices, including consoles, PCs, and mobile
4 devices. PX1777 at 34 (Spencer, Nadella, Bond (Microsoft) deposition exhibit).
- 5 13. Gaming consoles are designed to primarily play video game software. PX8001 (Ryan
6 (Sony) declaration) at ¶15.
- 7 14. Games can be played on general purpose PCs or gaming PCs, but gaming PCs typically
8 have more advanced hardware to allow them to play more computationally demanding
9 games. PX8001 (Ryan (Sony) declaration) at ¶ 15.
- 10 15. Conversely, games played on mobile have lower graphics and are less sophisticated than
11 games played on consoles or gaming PCs. PX8001 at 6 (Ryan (Sony) declaration).
- 12 16. The three primary console makers are Microsoft (Xbox Series X|S), Sony (PlayStation 5),
13 and Nintendo (Switch). PX1777 at 8 (Spencer, Nadella, Bond (Microsoft) deposition
14 exhibit).
- 15 17. A game publisher brings games to market and sometimes provides funding to the game
16 developer to do so. PX7014 (Booty (Microsoft) IH) at 28:5-15.
- 17 18. A developer creates the assets for a game, including writing the code and designing the
18 art. PX7014 (Booty (Microsoft) IH) at 28:5-15).
- 19 19. First-party content is created and developed by a console manufacturer at an in-house
20 studio. PX7014 (Booty (Microsoft) IH) at 58:20–59:9.
- 21 20. Microsoft has first-party content that is created at Xbox Game Studios. PX9050 at 15
22 (Microsoft 10-K 2022); PX0003 at 16 (2R narrative response).
- 23 21. Some of Microsoft’s first-party franchises include DOOM, Forza, Gears of War, Halo,
24 Minecraft and The Elder Scrolls. PX9252 (Microsoft website).
- 25 22. Third-party content refers to games that are independently developed and published by a
26 third-party publisher. PX8001 (Ryan (Sony) declaration) at ¶ 5; PX0003 at 16 (2R
27 narrative response).
- 28

23. Occasionally, console manufacturers will publish titles developed by a third-party development studio, known as second-party games. PX8001 at 2 (Ryan (Sony) declaration); PX7003 (Bond (Microsoft IH) at 152:2-10; PX0003 at 16 (2R narrative response).

B. Console Gaming

24. Video game consoles are consumer devices that are designed for, and whose primary use is, to play video games. PX8001 (Ryan (Sony) declaration) at ¶ 10.

25. Consumers purchase video game consoles based on the hardware features of the consoles as well as the availability of game content on that console. PX8001 (Ryan (Sony) declaration) at ¶ 4, 11; PX7053 (Ryan (Sony) Dep. Vol. I) at 21:1-5.

26. Console manufacturers earn revenues from several sources: sales of consoles (*i.e.*, hardware) and revenue shares or royalties from sales of video game titles (*i.e.*, software) and accessories for the console, including game controllers, headsets, supplemental storage, cables, and power supplies. PX8001 (Ryan (Sony) declaration) at ¶ 4; PX0003 at 016.

27. Console manufacturers can also earn revenue from post-sale monetization. For example, console manufacturers may split royalties with publishers and developers on the sale of add-on content or in-game purchases. PX1110 at 012 (Tim Stuart) (Microsoft); PX1065 at 003 (Microsoft).

28. A trio of gaming companies—Microsoft (under its Xbox brand), Sony (under its PlayStation brand), and Nintendo—produce the most popular video game consoles today. PX0003 at 060 (MSFT Second Request Response).

29. These manufacturers historically release new generations of their consoles approximately every five to ten years in “generations.” PX0003 at 060 (MSFT Second Request Response); PX9037 at 001-003.

30. Consoles are in the Ninth Generation and include Sony’s PlayStation 5 and Microsoft’s Xbox Series X|S. PX0003 at 105.

31. Nintendo's most recent console, the Switch, was released in 2017. PX7059 (Prata (Nintendo) Dep.) at 19:24-20:1.
32. The Nintendo Switch is not a Generation 9 console, consistent with Nintendo staying at least one generation behind current generation hardware. PX2421 at 8-9.
33. In addition to the Switch, Nintendo also makes the Switch OLED and the Switch Lite, two models of the Switch with slight hardware differences. PX8002 (Prata (Nintendo) declaration) at ¶ 5.
34. The OLED version has the same features and functionality of the Switch, but with a slightly larger OLED touch screen that allows for more vivid color and sharper contrast. PX8002 (Prata (Nintendo) declaration) at ¶ 5. There are no additional games or functionality available on the OLED version as compared to the Switch. PX8002 (Prata (Nintendo) declaration) at ¶ 5.
35. The Switch Lite can only be played in handheld mode. All games that play in handheld mode are supported on the Switch Lite. PX8002 (Prata (Nintendo) declaration) at ¶ 5.

1. PlayStation and Xbox are Fierce Competitors, and Nintendo is Differentiated

36. For the last 20 years, Microsoft and Sony have viewed each other as each company's closest competitor in console gaming. PX8001 (Ryan (Sony) declaration) at ¶ 12.
37. An internal Microsoft Gaming analysis provides: "Historically, Sony has been Microsoft's primary competitor in gaming, with similar products, services, and business models vying for similar customers." PX1638 at 019.
38. Each console generation represents an opportunity for Sony or Microsoft to "win" the console generation by shifting the distribution of gamers onto their respective console. PX8001 (Ryan (Sony) declaration.) at ¶ 11.
39. In the United States, Microsoft won Generation 7 with the Xbox 360 pitted against the PlayStation 3. PX8001 (Ryan (Sony) declaration.) at ¶ 11. However, Sony won Generation 8 with the PlayStation 4. PX8001 (Ryan (Sony) declaration.) at ¶ 11.
40. In this current generation—the ninth generation—the Xbox Series X|S and PlayStation 5 were both launched in November 2020 in direct competition. PX0003-050, 060.

41. The release of the Nintendo Switch in 2017, 3 years before the PlayStation 5 and Xbox Series X|S means that it did not have similar launch conditions in the market as the Generation 9 consoles. PX7028 (Spencer (Microsoft) Dep.) at 160:12-25.
42. Microsoft Gaming CEO, Phil Spencer, explained why Nintendo was excluded from Microsoft's estimations of Generation 9 console share: "Because PlayStation 5 and Xbox Series X are at the same place in their lifecycle in the consumer market." PX7028 (Spencer (Microsoft) Dep.) at 159:2-11.
43. Microsoft's President of Xbox Games Marketing, Aaron Greenberg, went as far as to say, "I would suggest in general we try to avoid calling Switch a console, as it is really a portable gaming device." PX5000 (Lee Report) at 77; PX1950 at 001.
44. The Xbox Series X|S and PlayStation 5 also launched with similar pricing schemes. The more advanced Xbox Series X and PlayStation 5 launched with a price of \$499 while the Xbox Series S and PlayStation 5 Digital Edition launched at \$299 and \$399, respectively. PX7028 (Spencer (Microsoft) Dep.) at 138:22-139:8; PX8001 (Ryan (Sony) declaration.) at ¶ 12.
45. The Xbox Series X is a "premium" console while the Series S is more affordable. PX0003 at 016. Together, these consoles provide Microsoft's "flagship gaming experience." PX1022 at 037 (Hampton email).
46. Microsoft CEO Satya Nadella hailed the success of the Xbox Series X|S in a July 26, 2022 earnings call when he announced that the company "ha[d] been the market leader in North America for three quarters in a row among next gen consoles." PX7010 (Nadella (Microsoft) IH Tr.) at 66:12-21; PX9015 (Nadella IH exhibit) at 005.
47. In Generation 9, Microsoft's Xbox Series X|S and Sony's PlayStation 5 have engaged in very close competition in the United States. PX7028 (Spencer (Microsoft) Dep.) at 156:3-156:13; PX1240 (Stuart IH exhibit) at 019; PX7053 (Ryan (Sony) Dep.) at 14:16-15:5.
48. Although Nintendo is often "recognized as one of the three most prominent video gaming consoles," its offering is "commonly distinguished by video game users and the industry

from Microsoft’s Xbox and Sony’s PlayStation consoles. PX8002 (Prata (Nintendo) declaration) at ¶ 3.

49. As Nintendo’s Executive Vice President of product development and publishing, Tom Prata, stated, the Switch “is different from most other consoles, such as the Xbox and PlayStation. PX8002 (Prata Decl.) at ¶ 4.

50. “Rather than following or iterating off of industry trends, Nintendo competes by offering users a gaming experience distinct from” Xbox and PlayStation. PX8002 (Prata (Nintendo) declaration) at ¶ 3.

51. The Switch has “unique innovations” that “deliver new experiences to consumers” and “help differentiate Nintendo products from Xbox and PlayStation. PX8002 (Prata (Nintendo) declaration) at ¶ 3.

52. To start, Nintendo is a “hybrid” console, while Xbox and PlayStation are considered stationary consoles. PX7059 (Prata (Nintendo) Dep.) at 20-25; PX7065 (Singer (Nintendo) Dep.) at 72:5-12.

53. As a hybrid console, Nintendo offers both stationary and portable play modes, which include handheld or tabletop mode. PX8002 (Prata (Nintendo) declaration) at ¶ 4.

54. The Switch controllers, called “Joy-Cons,” can be detached to control gameplay both through movement and pressing buttons, and provide “a greater feeling of physical involvement in the game.” PX8002 (Prata (Nintendo) declaration) at ¶ 4.

55. Joy-Cons can be used separately so that two players can simultaneously enjoy multiplayer games while physically in the same place, and they can also be used in tabletop mode. PX8002 (Prata (Nintendo) declaration) at ¶ 4.

56. The Xbox and PlayStation do not have these same capabilities. The Xbox and PlayStation have more traditional gaming console controllers that cannot be detached, and the system itself, being stationary, “cannot be easily taken out of the home.” PX7065 (Singer (Nintendo) Dep.) at 70:22-71:17; PX7035 (Kotick (Activision) Dep.) at 143:14-21.

57. While the Switch can run from a battery in portable mode, the Xbox and PlayStation must be plugged into a wall and connected to a TV. PX7065 (Singer (Nintendo) Dep.) at 72:5-19.

58. As a result of these hardware differences, Nintendo provides a differentiated console experience, in which motion controls and portability inform game development. PX7059 (Prata (Singer) Dep.) at 59:23-60:7; PX1950 at 001. PX7035 (Kotick (Activision) Dep.) at 215:7-215:19, 225:6-225:16; PX7059 (Prata (Nintendo) Dep.) at 67:13-21.

59. While Nintendo provides a unique form of gameplay, the Xbox and PlayStation offer higher performance. As the President of Xbox Games Marketing, Aaron Greenberg explained the Switch is a “lower spec device” and that is because games are designed to match the specifications of a device. Games built for the PlayStation 5 or Xbox Series X|S would have to be designed differently for the Switch. PX7031 (Greenberg (Microsoft) Dep.) at 59:23-60:21.

60. As Sony’s CEO recognizes “Nintendo’s hardware technology is of a much less sophisticated nature than PlayStation or Xbox.” PX7053 (Ryan (Sony) Dep.) at 21:9-16. Similarly, Activision’s CFO testified “Nintendo has . . . very different capabilities than Microsoft and Sony has. . . Nintendo is not at the forefront of technology.” PX7004 (Zerza (Activision) IH) at 74:2-14.

61. A December 15, 2022 internal briefing for Activision’s CEO stated, “Switch

[REDACTED]

[REDACTED]

[REDACTED] PX2421 at 2.

62. The Xbox and PlayStation are significantly more powerful than the Switch. The Switch’s maximum processing power reaches only 393 gigaflops (even less in handheld mode – 236 gigaflops), while the Xbox Series X and PlayStation 5 are at least 26 times (i.e., 2600%) more powerful, capable of 12 and 10.3 *teraflops*, (12,000 and 10,300 gigaflops) respectively. PX5000 (Lee Report) at 80, fig. 13.

75. Nintendo’s distinctive gaming experiences has created a deeply loyal fanbase. PX8002 (Prata (Nintendo) declaration) at ¶ 9.

76. By contrast, Xbox and PlayStation consoles depend heavily on third party titles for software revenue. PX1072 at 001; PX8001 (Ryan (Sony) declaration.) at ¶ 5 (“
[REDACTED]
[REDACTED]
[REDACTED]”).

77. For several reasons, the Switch content “tends to resonate particularly well with families and children” when compared to the “Xbox and PlayStation.” PX8002 (Prata (Nintendo) declaration) at ¶ 10; PX7059 (Prata (Nintendo) Dep.) at 94:14-20.

78. Nintendo tends to be more family-friendly and its most iconic games appeal to a younger audience. PX7053 (Ryan (Sony) Dep.) at 22:11-22:22; PX8002 (Prata (Nintendo) declaration) at ¶ 10.

79. Nintendo has “some of the most family-friendly multiplayer games that are trusted by parents and loved by families.” PX8002 (Prata (Nintendo) declaration) at ¶ 10.

80. The “Switch’s mobility and multiplayer hardware features allow families to enjoy playing these games together at home or while traveling on vacation together.” PX8002 (Prata (Nintendo) declaration) at ¶ 10.

81. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

2. Console Gaming is Distinct from PC and Mobile Gaming

a) PC Gaming Is Distinct

82. PCs are used more broadly for general purposes rather than dedicated gaming. PX0003 at 136 (MSFT Second Request Response).

83. Although consumers may play games on personal computers (“PCs”), it is a distinct and differentiated experience. PX5000 (Lee Report) at 93.

84. Gaming PCs, which possess specialized parts dedicated to run computationally demanding games, may have superior performance than that of even the most recent Generation 9 consoles; they can more easily handle games with greater graphical intensity and run them faster. PX8001 (Ryan (Sony) declaration.) at ¶ 15; PX1324 (Phil Spencer doc); PX3053 at 003 (Sony).

85. Gaming PCs tend to be more expensive than video game consoles with gaming PCs costing anywhere from \$800 to more than \$2500, while Generation 9 consoles retail for approximately \$300 to \$500. PX8001 (Ryan (Sony) declaration.) at ¶ 15.

86. High-performance consoles—unlike PC gaming devices—rely heavily on subsidies, generating most of their revenue from subsequent game sales after a customer has purchased a console. PX1494 at 001; PX1145 at 001.

87. The audience for PC gaming is also different than the audience for console gaming. High-end PC gaming often requires a higher level of technical competency in assembling specialized equipment. PX8001 (Ryan (Sony) declaration) at ¶ 15. PC gamers will often build or specially customize their devices with a wide variety of components to add extra upgrades and personalize their experience. PX8001 (Ryan (Sony) declaration) at ¶ 15. That stands in contrast to consoles, which are designed to be used out of the box, and whose users tend to customize their devices far less. PX8001 (Ryan (Sony) declaration) at ¶ 15.

88. PC gamers tend to favor keyboard-and-mouse inputs to play their games while console gamers predominantly rely on the accessory controller sold by Microsoft, Sony, or Nintendo. PX3053 at 022 (Sony).

89. The content portfolio is an additional differentiator between PC gaming and console gaming. [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 90. These differences between PC gaming and console gaming affect the commercial
4 strategy and revenues of gaming companies. [REDACTED]

5 [REDACTED]
6 [REDACTED] PX4647 at 002 (Microsoft); PX1476 at 1-2
7 (Microsoft).

8 91. Microsoft's internal documents show that they saw console gaming and PC gaming as

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]. PX1639 at 003.

13 92. In a yearly report on the gaming market, [REDACTED]

14 [REDACTED]. PX1563 at 25-30 [REDACTED]
15 [REDACTED]

16 93. Similarly, Activision CFO Armin Zerza distinguished between PC and console segments
17 in terms of where Activision competes and who the major participants are: "[W]e
18 compete across different platforms, you know, with PC platforms, like Steam, with
19 console platforms like, Sony, Nintendo, Microsoft, with mobile platforms like Apples
20 and Googles." PX7004 (Zerza (Microsoft) Dep.) at 219:7-12.

21 94. [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 95. While buy-to-play games accounted for [REDACTED] of the revenue for console gaming in 2020,
25 it accounted for only [REDACTED] of revenue for PC gaming. PX1571 at 017. Nearly [REDACTED] of PC
26 gaming revenue was derived from free-to-play games. PX1571 at 017.
27
28

96. Microsoft is much more likely to publish their games on PC than rival consoles. Microsoft CEO Phil Spencer testified “We launch games on PC and console almost every instance on the same day.” PX7011 (Spencer (Microsoft) IH Vol. I) at 124:2-4.

97. The most popular distribution channels for PC games does not resemble the distribution channels for consoles. While Sony and Microsoft make sales in their respective digital stores, the most prominent digital marketplaces for PC games include Valve’s Steam Store, the Epic Games Store, and Activision’s Battle.net. PX1476 (Microsoft) at 001; PX0004 at 030 (Activision Second Request Response).

b) Mobile Gaming Is Distinct

98. Mobile is the largest segment of gaming according to Microsoft’s internal gaming analysis, with [REDACTED] of gamers playing on mobile. PX1563 at 5, 11.

99. Microsoft reported that many players either exclusively play mobile, or multi-home with mobile and other gaming devices. 45% of gamers only play on mobile, 21% play on console, mobile, and PC, and 5% only play on console and mobile. PX1563 at 32.

100. In a yearly report on the gaming market, [REDACTED] [REDACTED]. PX1563 at 25–30.

101. Game development for mobile devices is significantly less expensive than development for consoles. PX0003 at 073 (MSFT Second Request Response).

102. Mobile game development also relies on smaller teams of developers and less technological innovation. PX0003 at 073 (MSFT Second Request Response).

103. Mobile gaming also requires different design considerations given the large difference in form factor. As Activision’s CEO expressed, “the controller matters greatly. So when you’re playing on glass [mobile], it’s going to be a different experience than the one you’re going to play on the PlayStation.” PX7035 (Kotick (Activision) Dep.) at 142:12-142:25.

104. Tim Stuart, Microsoft Gaming CFO, recognized that mobile gaming tends to be a more “casual path” than console gaming. PX1170 at 001 (Tim Stuart & Phil Spencer doc).

1 105. Lori Wright, Vice President of Business Development for Gaming, Media, and
 2 Entertainment at Microsoft, testified in the *Epic Games Inc. v. Apple, Inc.* trial that “[w]e
 3 [Microsoft] certainly don’t view iPhone as a competing device” to Xbox consoles and
 4 that [w]e do not view the iPad as a competing device.” PX6000 at 51-52 (Lori Wright
 5 testimony).

6 **C. Multi-Game Content Subscription Services**

7 106. Multi-Game Content Subscription Services (or “content subscription services”) provide
 8 subscribers access to a library of video games for a periodic subscription fee, typically
 9 monthly or yearly. PX0003 at 018; PX0006 at 013.

10 107. Unlike traditional buy-to-play games, with content subscription services, gamers
 11 purchase a recurring subscription and can play any game contained in the library for zero
 12 additional cost above the subscription fee. PX0003 at 018; PX0006 at 013.

13 108. Microsoft launched its content subscription service, Game Pass, in 2017. PX0006 at 013.

14 109. Game Pass is available in two different tiers. PX0003 at 018. Xbox Game Pass for
 15 Console and Xbox Game Pass for PC provides subscribers access to a library of over 300
 16 first-party and third-party games for download to play on an Xbox console or Windows
 17 PC, respectively. PX0003 at 018.

18 110. The highest tier, Xbox Game Pass Ultimate, provides access to a library of games for
 19 both Xbox consoles and Windows PCs, which subscribers can download and play or
 20 access through cloud gaming. PX0003 at 018.

21 111. Approximately [REDACTED] of Game Pass subscribers subscribe to Game Pass Ultimate.
 22 PX0003 at 018.

23 112. Microsoft’s CEO Satya Nadella has described Game Pass as a “Netflix for Games.”
 24 PX7010 (Nadella (Microsoft) IH) at 78:17-20; PX1283 at 008.

25 113. Xbox Game Pass had over 25 million total subscribers by the beginning of 2022.
 26 PX1516 at 039; PX9003 at 003.

27 114. In the United States, Xbox Game Pass had over [REDACTED] paid subscribers, including
 28 over [REDACTED] subscribing to Game Pass Ultimate and over [REDACTED] subscribing to

Game Pass PC. PX5000-055, -056 (citing Microsoft monthly subscriber counts data). Xbox Game Pass is the market leader in content subscription services. PX5000 (Lee Report) at 041; PX8001 (Ryan Decl.) ¶ 9.

115. Aside from Game Pass, Microsoft also offers Xbox Live Gold, which provides subscribers to access to online, multiplayer games and a limited selection of downloadable games each month among other benefits, such as audio and visual communications and certain discounts. PX0003 at 018.

116. Xbox Live Gold does not provide subscribers with access the vast library of games that subscribers of Xbox Game Pass for PC or Console and Game Pass Ultimate receive. PX0003 at 018.

117. Sony has the second most popular content subscription service, called PlayStation Plus. PlayStation Plus has three tiers. The highest two tiers—PlayStation Plus Extra and PlayStation Plus Premium—are content subscription services. PX7053 (Ryan (Sony) Dep.) at 17:9-14. Those two tiers provide similar features that correspond to Microsoft's Xbox Game Pass for PC or Console and Game Pass Ultimate. PX7053 (Ryan (Sony) Dep.) at 17:9-22.

118. By subscribing to PlayStation Plus Extra, subscribers gain access to up to 400 games within PlayStation's library. PX8001 (Ryan (Sony) declaration) at ¶ 9. Those who subscribe to PlayStation Plus Premium receive access to a library of up to 740 games and cloud gaming services for certain games. PX8001 (Ryan (Sony) declaration) at ¶ 9.

119. [REDACTED]
[REDACTED]
[REDACTED]

120. Like Microsoft's Xbox Live Gold, the lowest tier of PlayStation Plus—PlayStation Plus Essential—offers subscribers access to online, multiplayer games and two monthly downloadable games alongside discounts on other games and cloud storage. PX8001 (Ryan (Sony) declaration) at ¶ 9. PlayStation Plus Essential does not provide subscribers

- access to the vast libraries available to subscribers of PlayStation Plus Extra and PlayStation Plus Premium receive. PX8001 (Ryan (Sony) declaration) at ¶ 9.
121. PlayStation Plus Essential, the most basic tier, of PlayStation Plus services provides similar services to Microsoft's Xbox Live Gold: access to online multiplayer and the ability to access a limited selection of monthly downloadable games. PX7053 (Ryan (Sony) Dep.) at 17:1-8.
122. Amazon provides two content subscription services: Prime Gaming and Luna+. Prime Gaming is included with an Amazon Prime subscription, which costs \$14.99 per month and includes several other non-gaming related benefits. Luna+ offers subscribers access to a library of games, priced at \$9.99 per month with additional options available for further purchases and provides streaming access to a library of over 100 third-party games. See Amazon Luna, <https://www.amazon.com/luna>; PX3206 (Amazon), Luna OP122 (Oct. 5, 2021) at 004.
123. Electronic Arts also offer content library services, EA Play, for its own published titles. EA Play can also be accessed through a subscription to Microsoft's Game Pass Ultimate. PX7011 (Spencer (Microsoft) IH Vol. I) at 260:3-260:15; PX0003 at 018, 019.
124. Ubisoft offers Ubisoft+ in two tiers: PC Access, for \$14.99/month, and Multi Access, for \$17.99/month. Both tiers allow subscribers to pay over 100 Ubisoft games on PC (through Ubisoft Connect or Steam), including new releases available at launch, premium editions, and select third-party indie games. PX0006 at 80.

D. Cloud Gaming Subscription Services

125. For years, video games have run locally on the player's hardware—typically a Windows PC or gaming console located in the player's home. PX8000 (Eisler (Nvidia) declaration) at ¶ 6, 50.
126. Recently, however, cloud gaming services have been introduced that allow players to stream games that run on remote hardware without downloading the game locally. PX8000 (Eisler (Nvidia) declaration) ¶ 7; PX0003 at 077.

- 1 127. The primary computational processing for the game occurs in a remote datacenter, and a
2 live video feed of game is streamed to a player's device. PX0003 at 095; PX8000 (Eisler
3 (Nvidia) declaration) at ¶ 7.
- 4 128. Cloud gaming broadens access to gaming by expanding the universe of devices that can
5 play games. <https://www.xbox.com/en-US/xbox-game-pass/supported-devices>; see also
6 PX8000 (Eisler (Nvidia) declaration) at ¶ 6, 17.
- 7 129. Today, cloud gaming subscription services can stream games to consoles, Windows PCs,
8 Mac PCs, Chromebook PCs, tablets, mobile phones, and some smart TVs, with device
9 compatibility varying by service. PX0003 at 018 (Microsoft FTC Second Request
10 response, Jul. 1, 2022); PX7050 (Choudhry (Microsoft) Depo.) at 22:11–21; PX0006 at
11 088 (European Commission Form CO, Case M. 10646, Acquisition by Microsoft of
12 Activision Blizzard, Sep. 30, 2022). See also PX8000 (Eisler (Nvidia) declaration) at 1.
- 13 130. Cloud gaming enables gamers to begin playing a game in seconds, rather than waiting for
14 games to download or update, and streaming rather than downloading avoids burdening
15 the storage limits on a gaming device. [https://support.xbox.com/en-US/help/games-](https://support.xbox.com/en-US/help/games-apps/cloud-gaming/playing-console-game-from-cloud-versus-installing)
16 [apps/cloud-gaming/playing-console-game-from-cloud-versus-installing](https://support.xbox.com/en-US/help/games-apps/cloud-gaming/playing-console-game-from-cloud-versus-installing) (“You can start
17 playing a game in seconds. There’s no waiting for games to finish installing or
18 updating.... download times or storage limits aren’t a factor.”); PX8000 (Eisler (Nvidia)
19 declaration) at ¶ 17.
- 20 131. This permits gamers to play computationally demanding games on less powerful devices
21 that otherwise lack the computing power or storage to support the games.
22 <https://www.nvidia.com/en-us/geforce/geforce-experience/>; PX8000 (Eisler (Nvidia)
23 declaration) at ¶ 9, 17 (explaining the advantage of permitting gamers to play large and
24 technologically complex games on less powerful devices that otherwise lack the
25 computing power or storage to support the games); PX3103 at 008 (Notes of CMA call
26 with Nvidia, Jan. 9, 2023).
- 27 132. In September 2020, Microsoft added cloud gaming to its top-tier multi-game content
28 library subscription service offering, Xbox Game Pass Ultimate. PX9091.

- 1 133. Xbox Cloud Gaming (also referred to as xCloud) enables Xbox Game Pass Ultimate
2 subscribers to stream certain games, as opposed to downloading games locally, and then
3 to play those games on the device most convenient to them, including consoles, Windows
4 PCs, tablets, and mobile phones. PX0003 at 018.
- 5 134. Microsoft also offers free access to Xbox Cloud Gaming for Epic Games' *Fortnite*.
6 PX0003 at 019.
- 7 135. *Fortnite* on Xbox Cloud Gaming is separate for Game Pass Ultimate (i.e., no subscription
8 is required to play *Fortnite*), and Microsoft expects to launch more streamable free-to-
9 play games over time. PX0003 at 019.
- 10 136. To date, more than 20 million gamers have used Xbox Cloud Gaming to stream games
11 from the cloud. PX9171 (Microsoft 1Q FY23 Earnings Call (October 25, 2022))
12 (Nadella: "[W]ith Cloud Gaming, we're transforming how games are distributed, played,
13 and viewed. More than 20 million people have used the service to stream games to
14 date.").
- 15 137. According to Microsoft, "[c]loud gaming services remain in their infancy but cloud
16 gaming is evolving rapidly (both in terms of the number of services available and the size
17 of the relevant catalogues), and is expected to grow in the short- to medium-term."
18 PX0003 at 074.
- 19 138. Other companies that have introduced cloud gaming include Amazon, Nvidia, and
20 Google. PX0003 at 068. Sony has also introduced cloud gaming available on the highest
21 tier of its PlayStation Plus subscription service, "PlayStation Plus Premium," with plans
22 to expand its cloud gaming services. PX8001 (Ryan (Sony) declaration) at ¶ 9; PX3080
23 at 075.
- 24 139. Amazon's Luna+ (a tier of Amazon Luna), priced at \$9.99 per month with additional
25 options available for further purchases, provides streaming access to a library of over 100
26 third-party games. See Amazon Luna, <https://www.amazon.com/luna>; PX3206
27 (Amazon), Luna OP1 22 (Oct. 5, 2021) at 004.
- 28

140. Nvidia GeForce NOW, priced at \$49.99 for six months for the Priority tier or \$99.99 for six months for the RTX 3080 tier, allows gamers access streaming versions of game titles that the gamers already own, with the streaming hosted on Nvidia Corporation datacenters. Nvidia, GeForce NOW, <https://www.nvidia.com/en-us/geforce-now/>; PX8000 (Eisler (Nvidia) declaration) at ¶¶ 16, 18, 28.

141. Google Stadia Pro was priced at \$9.99 per month with additional options for further purchases, allows gamers to stream games from a library of hundreds of third-party games. PX8003 (Zimring (Google) declaration) at ¶ 3.

142. Google discontinued Stadia in January 2023 in part due to the cost and difficulty of securing content to offer to Stadia users. PX8003 (Zimring (Google) declaration) at ¶ 2.

E. A Gaming Platform Must Offer AAA Content to Succeed

143. “AAA” content is an industry term and can be synonymous with “a tentpole title, a marquee title, a big blockbuster title” that has a high development budget and high expectations for sales. PX7046 (Leder (Microsoft) Dep.) at 97:1-11; PX7011 (Spencer (Microsoft) IH) at 36:22-37:3 (“I wouldn’t say there’s an industry definition for what AAA actually means. I think the notion of a AAA game is a game with a high development budget with presumably a high expectation for -- for sales and kind of splash when it launches.”); PX8001 (Ryan (Sony) declaration) at ¶ 20 (“AAA games often feature cinematic storytelling, immersive environments, and detailed graphics.”).

144. AAA games are particularly important in the gaming industry. PX8001 (Ryan (Sony) declaration) at ¶ 18-23.

145. “AAA” or tentpole titles can drive customer growth and engagement, as they “lift the entire tent” for other types of content. PX1089-009. PX7046 (Leder (Microsoft) Dep.) at 111:24-112:12

146. Microsoft and Sony need to have these AAA titles to build their gaming ecosystem. PX1102 (Microsoft), Email from J. West to A. Hood (May 24, 2021) at 001 (“Specifically, we want to bet bigger on tentpoles (things we believe will drive acquisition, engagement hours, and have talkable and shareable marketing value).”);

PX8001 (Ryan (Sony) declaration) at ¶ 24 (Activision content critical to PlayStation competitiveness).

147. AAA titles have long development cycles with high engagement, leading to a reduced supply of gaming content. PX1050 (Microsoft) at 034-35 [REDACTED]

148. Consolidation in the industry has led to fewer AAA titles. PX1154 (Microsoft) at 1 (“With consolidation in the industry and fewer AAA titles that we can capture into XGP – we will need to find strategic / creative ways to ensure continuity of our content pipeline.”)

149. In past acquisitions, Microsoft has made procuring AAA content its main driver. For example, during the proposed transaction of Square Enix, Microsoft identified Square Enix as having [REDACTED] as well as [REDACTED] PX1791 at 4.

1. The Industry Has a History of Consolidation

150. Over the last decade there has been significant, accelerating consolidation among video game publishers and developers. PX2094 at 015; PX0027 at 002-4; PX7039 (Sakhnini (Activision) Dep.) at 116:5-117:9.

151. Between 2018 and 2020, Xbox Game Studios acquired eight additional game studios including Playground, The Initiative, Ninja Theory, Undead Labs, Compulsion Games, inXile, Obsidian, and Playground. PX1425 at 005.

152. The need for and scarcity of content has driven this consolidation. Microsoft gaming CFO Tim Stuart explained “[w]ith consolidation in the industry and fewer AAA titles that we can capture into [Xbox Game Pass] – we will need to find strategic / creative ways to ensure continuity of our content pipeline.” PX1154 at 001.

153. [REDACTED] PX1136 at 1.

- 1 154. Microsoft gaming CEO Phil Spencer commissioned a [REDACTED]
2 [REDACTED]
3 [REDACTED] PX1136 at 1; PX1791 at 18. [REDACTED]
4 [REDACTED]
5 [REDACTED] PX1791 at 49.
- 6 155. [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] PX1791 at 26.
- 12 156. Microsoft generated an “Industry Outcomes” memo at same time as it was finalizing the
13 Proposed Acquisition of Activision but claimed legal privilege over the analysis and
14 refused to answer questions about it. PX7026 (Hampton (Microsoft) Dep.) 253:11-
15 254:11.
- 16 157. When seeking board approval for the ZeniMax acquisition Microsoft noted that
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] PX1050 at 004. Microsoft recognized that subscriber scale is
20 imperative for a successful subscription service, and that “the supply of attractive games
21 is structurally limited.” PX1050 at 032, 34-36.
- 22 158. When analyzing the ZeniMax acquisition for its Board of Directors, [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED] PX1050 at 035.
- 26 159. Activision was also aware of consolidation in the Gaming Industry. A July 2021 Long
27 Range Plan explains: [REDACTED]
28 [REDACTED] PX2094 at 006. [REDACTED]

[REDACTED] PX2094 at 015.

2. A Small Group of Top AAA Games Is Particularly Important

160. Video game sales and revenues are concentrated among a relatively small number of hit “blockbuster” titles and franchises often referred to as “AAA” games. PX5000 at 035.

161. According to Jerrett West, Corporate Vice President of Gaming at Xbox, the terms “tentpole game” and “AAA game” are largely interchangeable. PX7005 (West) (Microsoft) IH at 75:24-76:1. Mr. West defines tentpole content as “things we believe will drive acquisition, engagement hours, and have talkable and shareable marketing value” and describes them as “rare commodities.” PX1102 at 001. Matt Booty, Head of Xbox Game Studios, notes that “[t]he number of AAA developers continues to drop.” PX7014 (Booty) (Microsoft) IH Tr. 230:12-231:4.

162. In a 2023 email a Microsoft Executive noted that, “there are relatively few of these games being released – either by us or by 3P- - annually. The stat to call out here is there’s been [REDACTED] games since 2018 that have sold [REDACTED] copies on our platform. [REDACTED] [REDACTED]” PX4673 at 002.

163. Microsoft documents highlight the importance of AAA exclusive content for driving console sales and Xbox Game Pass growth. A 2019 Microsoft document regarding the potential acquisition of Square Enix explains that “having access to relevant content is one of the single most important drivers in both console growth (where an exclusive AAA release accounts for a 2-4% console share shift in the US and a 1-3% shift worldwide) and [REDACTED] [REDACTED] PX1136 at 004.

164. A 2021 report by a consultant to Microsoft explains that tentpoles are “pre-eminent acquisition and retention drivers.” PX1089 at 009.

1 165. Regardless of the specific term used there is widespread industry recognition that certain
 2 games are particularly important drivers of sales and engagement. PX7033
 3 (Schnakenburg) (Activision) Dep. 146:4-147:22.

4 166. A declaration from Phil Eisler, Vice President and General Manager of Nvidia GeForce
 5 Now, observes, “Access to AAA titles, which are the latest, most-popular gaming
 6 franchises, is critical to the success of any gaming platform.” PX8000 at 006.

7 **3. AAA Games are Difficult and Costly to Make**

8 167. The gaming industry recognizes four independent publishers, collectively known as the
 9 “Big 4”: Activision, Entertainment Arts, Take-Two, and Ubisoft. PX1019 [REDACTED]

10 [REDACTED]
 11 [REDACTED]
 12 168. The latest version of Halo, Halo Infinite, took [REDACTED]

13 [REDACTED] PX1419 [REDACTED]
 14 [REDACTED]

15 169. Other games can take even longer, [REDACTED]
 16 [REDACTED] PX7014 (Booty (Microsoft) IH) at 131:3-6
 17 [REDACTED]

18 170. Over 3,000 people worked on Call of Duty: Modern Warfare. PX9005 (Activision) at 4
 19 (2021 Annual Report).

20 171. When considered [REDACTED], producers of console
 21 and PC gaming content, [REDACTED]
 22 [REDACTED]

23 [REDACTED] PX1805 at 006 [REDACTED]

24 172. During the ZeniMax acquisition, Microsoft [REDACTED]
 25 [REDACTED]
 26 [REDACTED] PX1050 at 034-35.
 27
 28

173. Microsoft also believed that “ZeniMax ’s portfolio of tentpole and complementary franchises would provide the content infusion necessary to accelerate Xbox Game Pass subscriber growth across console, PC, and cloud.” PX1050 at 036.

174. An Activision presentation regarding its [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. PX2107 at 073.

175. Phil Eisler, Vice President and General Manager of Nvidia GeForce Now, explained the challenge that “[t]oday’s AAA video games...require tens of millions of dollars (in some cases over \$100 million) and years to produce.” PX8000 (Eisler (Nvidia) declaration) at ¶ 31.

176. The immense costs to develop quality games has limited the number of publishers with a proven track record of making AAA titles. [REDACTED]
[REDACTED]
[REDACTED]
PX1063 at 003.

F. Exclusive Gaming Content is Important for Attracting Customers and Driving Sales

177. Microsoft recognizes that [REDACTED]
[REDACTED]
[REDACTED] PX5000 at 149-50;
PX1070 at 002.

178. Internal market share simulators and machine-learning models produced by Microsoft estimate [REDACTED]
[REDACTED] PX5000 at 155; PX1477 at 001; PX1075
at 002.

1 179. During the ZeniMax acquisition, [REDACTED]
2 [REDACTED] PX1050 at 034.

3 180. The head of marketing for Xbox Game Studios, Aaron Greenberg, observed [REDACTED]
4 [REDACTED]
5 [REDACTED] PX1080 at
6 001.

7 181. SIE President Jim Ryan testified that Sony typically makes its first-party games exclusive
8 because exclusives are a “point of difference” between PlayStation and Xbox and “one of
9 the factors that gamers take into account when deciding which console to buy.” PX7053
10 (Ryan (Sony) Dep.) at 20:16-21:5. Likewise, almost all of Microsoft’s first-party games
11 are exclusive to Xbox. PX7011 (Spencer (Microsoft) IH (Vol. I)) at 360:2-13; PX5000 at
12 162.

13 182. Sony recognizes that partial exclusivity for third-party games provides an “incremental
14 point of difference” that is beneficial for PlayStation in attracting consumers to its
15 console. PX7053 (Ryan (Sony) Dep.) at 24:20-26:8.

16 183. A model of consumer demand for consoles and titles estimated by Dr. Robin Lee using
17 historical Microsoft sales data predicts an average share shift of 8.9% toward Microsoft
18 from making *Call of Duty* titles exclusive, and a smaller but significant shift toward
19 Microsoft from making other Activision titles exclusive. PX5000 at 156-57.

20 184. In attracting subscribers to Game Pass, Microsoft recognizes the importance of “content
21 that is ... exclusive to the service, to differentiate relative to other services,” and has
22 noted “a strong relationship, which we believe is causal, between differentiated content
23 and subscriber growth.” PX7011 (Spencer (Microsoft) IH) at 103:6-15; PX1065 at 015,
24 017.

25 185. [REDACTED]
26 [REDACTED]
27 [REDACTED] PX7007 (Stuart
28 (Microsoft) IH) at 167:5-168:9.

186. The head of marketing for Xbox Game Studios, Aaron Greenberg, observed [REDACTED]
 [REDACTED]
 [REDACTED] PX1951 at 001.

187. [REDACTED]
 [REDACTED] PX7007 (Stuart (Microsoft)
 IH) at 111:5-16.

188. [REDACTED]
 [REDACTED] PX2083 at 13 [REDACTED]

189. [REDACTED]
 [REDACTED]
 [REDACTED] PX1951 at 001; *see* PX7031 (Greenberg (Microsoft) Dep.) at 74:18-75:5 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

G. Activision Content is Particularly Important

190. Activision develops and publishes high-quality video games for multiple devices, including video game consoles, PC, and mobile devices. PX0004 at 012, 013.

191. According to Microsoft’s Board presentation summarizing the deal, Activision is the #1 publisher of video games for consoles. PX4341 at 027.

192. Activision’s “legendary franchises” include Call of Duty. World of Warcraft, Diablo, and Overwatch. PX4218 at 001; PX1511 at 002.

193. Activision’s CEO Bobby Kotick testified that Activision’s games are “iconic” and “beloved.” PX7006 (Kotick (Activision) IH) at 74:23-76:4).

194. Activision’s Vice Chairman Hunan Sakhnini testified that Activision makes “iconic IP” in titles like Diablo 4 and World of Warcraft, and expected Diablo 4 to become a “megahit.” PX7039 (Sakhnini (Activision) Dep.) at 93:3-24, 108:17-24.

195. Activision’s iconic video game titles include several leading AAA franchises – like Call of Duty, Overwatch and Diablo, that have individually earned more than \$1 billion in

lifetime revenues. PX1741 at 010; PX2113 at 010. In a presentation to a credit ratings agency, Activision's CFO and other characterized those three titles as "super franchises." PX2107 at 051.

196. Microsoft, in presentations to its Board of Directors regarding this Proposed Acquisition, called Activision's content "world class ... across console, PC, and mobile." PX4341 at 027.

197. Activision's largest franchise, Call of Duty, is one of the most successful entertainment franchises of all time. PX9005 at 4 (Activision2021 Annual Report).

198. In its 2021 Long Range Plan, Activision called Call of Duty a "super franchise," and indicated the franchise itself has over 150 million monthly active users. PX2094 at 007.

199. Even among AAA games, Activision's most well-known franchise, Call of Duty, is particularly strong. First released nearly twenty years ago in 2003, Call of Duty is, in Activision's own words, "one of the most successful entertainment franchises of all time." PX9005 at 004. Microsoft concurs. In its Board presentation outlining the Activision deal, Microsoft called Call of Duty the "#1 Console franchise since 2005 by revenue." PX4341 at 027.

200. Call of Duty is Activision's "key product franchise." PX9052 at 037 (Activision calls Call of Duty its "key product franchise"); PX8001 (Ryan (Sony) declaration) ¶ 24 (calling COD "unique"); *id.* ¶ 39 (listing COD first among Activision "must-have" franchises).

201. Activision releases new Call of Duty titles every year. This annual release cycle is unique among AAA games, with the exception of sports games, because games of this caliber often require immense time and resources that take years in between releases. Activision has overcome that barrier by using four separate studios and several support studios to complete the development work necessary to launch an annual release. PX8001 (Ryan (Sony) declaration) at ¶ 25.; PX7053 (Ryan (Sony) Dep. Vol. I) at 52:1-19 ("[Activision] has been able to organize themselves to release basically new [Call of

Duty] games every single year. And the games are different, unique games. There's nothing like it in the industry.”).

202. Call of Duty's loyal fanbase and enduring appeal have made it particularly valuable, influencing gamer engagement and gaming product adoption. PX2160 at 009; PX0031 at 003-004.

203. Call of Duty has a massive following, with {150} million monthly active users (“MAU”) in 2020, according to an Activision strategy document. PX2094 at 007.

204. In every year since 2014, the best-selling buy-to-play console game in the United States has been a Call of Duty game except for 2018, when Red Dead Redemption II was released. PX8001 (Ryan (Sony) declaration.) at ¶ 26; *see* PX9053 at 003 (Call of Duty will remain best-selling U.S. franchise in 2022 for 14th consecutive year). In 2018, Call of Duty Black Ops 4 ranked #2. PX8001 (Ryan (Sony) declaration) at ¶ 26.

205. In 2020, the #1 and #2 best-selling paid console games were Call of Duty titles. PX8001 (Ryan (Sony) declaration) at ¶ 26.

206. In 2021, Call of Duty: Vanguard topped the revenue charts as the best-selling game in the United States, with another Call of Duty title, Black Ops Cold War, coming in second. PX2056 at 001.

207. In 2022, Call of Duty: Modern Warfare II took in \$1 billion globally in the first ten days following its launch, making it the highest grossing entertainment opening of 2022. PX9132 (Activision 2021 Annual Report).

208. By comparison, the highest grossing film of 2022, Top Gun: Maverick, took one month to reach the \$1 billion threshold.

<https://www.economist.com/business/2022/11/29/microsoft-activision-blizzard-and-the-future-of-gaming>.

209. Call of Duty is the most requested title on GeForce NOW in April 2022. PX3052 at 31.

210. [REDACTED]

[REDACTED]

[REDACTED]

211. [REDACTED]

2 [REDACTED]

3 [REDACTED]

212. [REDACTED]

5 [REDACTED]

213. [REDACTED]

7 [REDACTED]

214. [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 **H. Microsoft Has a History of Making Content from Acquired Studios Exclusive**

215. As described *infra* in Sections IV.C., Microsoft has a history of acquiring game studios and making future releases from those studios exclusive to Xbox.

216. For example, Microsoft acquired a number of game studios in 2018-2019, and its approach to those acquisitions was that “going forward these new studios will focus on making games or our console and we have no plans to expand our exclusive first party IP to other consoles.” PX1949 at 002 (Microsoft email correspondence, Aug. 19, 2019); *see infra*, Section IV.C.2.

217. As discussed *infra* in Section IV.C.3., in 2021 Microsoft acquired ZeniMax Media (“ZeniMax”), the parent company of the large game developer and publisher Bethesda Softworks LLC (“Bethesda”), for \$7.5 billion. Microsoft told the European Commission that it would not have the incentive to withhold future ZeniMax titles from rival consoles, but subsequently decided to do exactly that. *See infra*, Section IV.C.3.

II. RELEVANT MARKETS

A. High-Performance Consoles Constitute a Relevant Product Market

Brown Shoe – Industry and Public Recognition

218. It is acknowledged within the industry that Microsoft and Sony are extremely close competitors. PX0006 at 064-065; PX1275 at 001; PX8001 (Ryan (Sony) declaration) at ¶¶ 12, 14.

219. [REDACTED] PX7028 (Spencer (Microsoft) Dep.) at 151:20-152:17, 157:11-18; PX1635 at 002. [REDACTED] PX7028 (Spencer (Microsoft) Dep.) at 158:16-25.

220. For example, in FY2022, the first full year that Xbox Series X|S consoles were available, one of Microsoft's key metrics for evaluating success was "% Market Share of Xbox Series Consoles vs. PlayStation 5. PX7011 at 165:22-166:23; PX1240 at 019; PX1274 (Nadella doc).

221. Internal analyses within Microsoft often exclude Nintendo consoles from their market research and focus on comparing Xbox to PlayStation in terms of branding and consumer preferences. PX1636 at 011-012.

222. Microsoft analyses of Xbox and PlayStation consoles market share often focus on the United States due the fact that the United States is almost half of Microsoft's business in Xbox sales. PX7028 (Spencer (Microsoft) Dep.) at 144:16-145:13.

223. [REDACTED] PX7028 (Spencer (Microsoft) Dep.) at 161:2-17.

224. [REDACTED]

225. As Sony’s CEO describes, “[w]e considered Nintendo to participate in a different market segment to Xbox and PlayStation.” PX7053 (Ryan (Sony) Dep.) at 21:9-14.

226. Gaming journalists and commentators in the public also frequently observe the vigorous competition between Xbox and PlayStation while excluding Nintendo’s consoles. In a public interview, the former head of Xbox commented, “We encouraged the console wars, not to create division, but to challenge each other. And when I say each other I mean Microsoft and Sony.” PX9061 at 001; PX9037 at 006 (“Microsoft and Sony at the forefront of the console wars, releasing competing devices within months of each other: first with the Xbox 360 and PlayStation 3 in the 00s, then with the Xbox One and PlayStation 4 in 2013, and now with the Xbox Series X and PlayStation 5. Nintendo, meanwhile, decided that warring over the cutting edge of entertainment was for suckers, and instead put out a series of comparatively underpowered consoles, most recently the Nintendo Switch, that cheerfully sold hundreds of millions of units.”).

Brown Shoe – Characteristics and Uses

227. Xbox Series X|S and PS5 consoles are the only high-performance consoles available today, and are considered to be in the ninth generation of gaming consoles. PX1635-002. An internal Microsoft Gaming competitive analysis notes that Sony’s [REDACTED]
[REDACTED]
[REDACTED] PX1638 at 019

228. The new generation of Xbox and PlayStation consoles possess extremely fast processing, which shapes the kind of content that can run on high-performance consoles, enabling higher resolution, realistic graphics, and cutting-edge performance. The delta between the technical performance of the Xbox Series X and PlayStation 5 is smaller than the delta between the Xbox One X and PS4 Pro. PX1635 at 002. *See also* PX7053, Ryan Depo Vol.1 at 21:16-22:3, 4/6/2023 (A: Many of the games that we make for PlayStation are simply too powerful to be played on a Nintendo Switch.); PX7048, Booty Depo at 42:17-43:6, 3/29/2023 (“Well, the Nintendo Switch is a very popular console, but it also

1 is less technically capable, just the hardware); PX7028, Spencer Dep. at 114:18-114:21,
2 3/8/2023.

3 229. From a consumer perspective, the Xbox Series X|S and PlayStation5 consoles are
4 “roughly comparable” in a number of technical specifications, including offering similar
5 graphics, user experiences, and hardware features. PX1275 at 002.

6 230. Nintendo itself prides itself on its unique approach by designing its console around
7 innovative features like motion control and hybrid form factor. PX7059 (Prata Dep.) at
8 66:19-67:3 158:7-22, 161:16-20; *See also* PX8002 at -001 (Declaration of Tom Prata,
9 Dec. 7, 2022). (“Nintendo’s integrated approach to hardware and software makes it
10 somewhat unique, however, and offerings developed by Nintendo that take advantage of
11 this integrated approach are commonly distinguished by video game users and the
12 industry from offerings on Microsoft’s Xbox consoles and Sony’s PlayStation consoles.”)

13 231. Microsoft’s internal strategy documents confirm this view. A Microsoft Gaming
14 competitive analysis observes [REDACTED]

15 [REDACTED]

16 [REDACTED] PX1638 at 018.

17 232. Both the Xbox Series X|S and PlayStation 5 consoles are home consoles typically played
18 on television screens and use a “traditional type of control scheme” relies on analog
19 sticks and buttons as opposed to motion control. PX7059 (Prata Dep.) at 45:5-46:23,
20 158:13-22; They lack the ability to remove controllers from their console and cannot be
21 easily taken out of the home. PX7065 (Singer Dep.) at 71:11-17.

22 233. However, their stationary design allows them the power and technical capability to run
23 more computationally demanding games. James Ryan Depo Vol.1 (PX7053), 21:16-
24 22:3, 4/6/2023) (A: Many of the games that we make for PlayStation are simply too
25 powerful to be played on a Nintendo Switch.

26 234. In contrast, Nintendo’s most recent console—the Nintendo Switch—is not a ninth-
27 generation gaming console. PX0003-060; PX1888 at -036 (“Console Gen9 Share –
28 Relative market share between Xbox Series X|S and PlayStation 5 in key markets” and

states “Nintendo Switch and Gen8 consoles are excluded”). The Nintendo Switch (“Switch”) also has lower computational performance, more in line with Microsoft’s and Sony’s eighth generation consoles. PX7011 at 169:19-25; PX1275; PX7053 (Ryan Dep. Vol. I) at 21:12-22:3)

Brown Shoe – Sensitivity to Price Changes / Substitutability

235. Multi-homing patterns also show that gamers tend to find the Xbox Series X|S and PlayStation 5 more substitutable for each other than the Nintendo Switch. Industry group data shows that from October 2020 through December 2020, nearly 40% of Xbox Series X|S and PlayStation 5 console owners also own a Nintendo Switch in the United States. By contrast, only 26% of PlayStation 5 console owners also own an Xbox Series X|S owners also own a PlayStation 5. PX5000 (Lee Report) at ¶ 213.

236. [REDACTED]

Brown Shoe – Distinct Prices

237. The Xbox Series X|S and PlayStation 5 also launched with similar pricing schemes. The more advanced Xbox Series X and PlayStation 5 launched with a price of \$499 while the Xbox Series S and PlayStation 5 Digital Edition launched with a price of \$299 and \$399, respectively. PX7028 (Spencer (Microsoft) Dep.) at 138:22-139:8; PX8001 (Ryan (Sony) Declaration) ¶ 12.

238. While the Xbox Series S had the same retail price at launch as the Nintendo Switch, PX7028 (Spencer (Microsoft) Dep.) at 138:22-139:8, the graphical and processing capabilities of the Series S are much more aligned with the Xbox Series X and PlayStation 5 consoles. PX8002-001 (Prata (Nintendo) Declaration) at ¶ 3; PX5000 at 080. In addition, [REDACTED] PX4631 at 008, 009; PX9207 at 005.

Brown Shoe – Distinct Customers

239. According to NPD data for October 2020–December 2020, in the United States nearly 40% of Xbox Series X|S and PlayStation 5 console owners also own a Nintendo Switch; in contrast, just 26% of PlayStation 5 console owners also own an Xbox Series X|S console, and just 16% of Xbox Series X|S owners also own a PlayStation 5. *See* PX0006 at -290 (European Commission Form CO, Case M. 10646, Acquisition by Microsoft of Activision Blizzard, Sep. 30, 2022). *See also* [REDACTED]

[REDACTED]

240. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

241. These multi-homing patterns are consistent with, on average, owners of an Xbox Series X|S console obtaining more value from purchasing a Nintendo Switch than a PlayStation 5 console and, likewise, owners of a PlayStation 5 console obtaining more value from purchasing a Nintendo Switch than an Xbox Series X|S console.

242. The patterns are also consistent with Nintendo’s claim in a declaration that “Consumers’ desires to be able to play games on Nintendo’s systems as well as games on other consoles is one reason that some consumers own a Nintendo Switch in addition to a Microsoft Xbox and/or Sony Play[S]tation.” PX8002 at -001–002 (Declaration of Tom Prata (Nintendo), Dec. 7, 2022).

243. [REDACTED]

[REDACTED]

- 1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
- 4 244. High-performance consoles target a different audience than their next closest substitute,
5 the Nintendo Switch. *See* Matthew Booty (Microsoft) Dep. (PX7048), 124:20-125:2,
6 3/29/2023. (“The Switch and Nintendo have somewhat different customer base than we
7 do, they tend to skew somewhat younger. Nintendo is known in general for what I would
8 call more family sort of rated games and not -- we should not assume that all of our
9 games would do well on Switch.”). The geographic footprint of the high-performance
10 consoles are also different because the Nintendo consoles “skews much more heavily
11 towards the Japanese market than the PlayStation market does or the Xbox market does.”
12 PX7053 (Ryan (Sony) Dep.) at 104:19-105:2.
- 13 245. As Nintendo has made clear, it focuses on “families and children” as its core audience,
14 and believes that its “hardware and content generally tends to resonate amongst these
15 demographics when compared to” Xbox and PlayStation audiences. PX8002 (Prata
16 (Nintendo) Decl. ¶ 10; ¶ 3; James Ryan (Sony) Dep. Vol.1 (PX7053), 22:11-22:22,
17 4/6/2023. Sony’s CEO remarked that Nintendo’s consoles were “defined by characters
18 such as Mario and Zelda, whereas [Sony’s] platform is characterized by games such as
19 Call of Duty or God of War, much more adult themed content.” PX7053 (Ryan (Sony)
20 Dep.) at 103:4-104:6
- 21 246. Dr. Robin Lee’s analysis shows Microsoft and Sony impose the most significant
22 competitive constraints on one another among console manufacturers and consumer
23 substitution to products outside of the High-Performance Video Games Consoles Market
24 would not constrain a hypothetical monopolist of high performance consoles from likely
25 profitably implementing a small but significant and non-transitory increase in price
26 (“SSNIP”). PX5000 at 102. His analysis concluded that a hypothetical monopolist of
27 high performance consoles would likely profitably impose a SSNIP on at least one
28

product contained within this market and thus High-Performance Video Game Consoles market satisfies the hypothetical monopolist test. PX5000 at 102.

B. Video Game Consoles Also Constitute a Relevant Market

247. The console market can be expanded to include Xbox Series X|S, PlayStation 5, and Nintendo Switch, although this is broader than necessary and does not eliminate the anticompetitive effects. PX5000 at 102 (Lee Report).

248. A monthly Xbox gaming finance presentation calculates shares in the United States between Microsoft, Sony, and Nintendo for the console market, but does not include PCs, or mobile devices. PX1240 at 19. (Stuart IH exhibit)

249. In their representations to the Federal Trade Commission, [REDACTED]

[REDACTED] PX0003 at 048, 060, 132 [REDACTED]

250.

251.

252. By comparison, the next largest video game console is the Valve Steam Deck, which

in 2022. PX5000 at 108 (Lee Report).

253. Nintendo recognizes itself as one of the three primary gaming consoles, but also has unique gaming offerings separate from Xbox and PlayStation consoles. PX8002 at ¶ 3,1-2 (Prata (Nintendo) Declaration)

254. Dr. Robin Lee's analysis of the High-Performance Video Game Consoles market shows that the High-Performance Video Game Consoles market satisfies the hypothetical monopolist test. PX5000 at 103. Because all products within the High-Performance Video Game Consoles market are wholly contained within the Video Games Consoles

market, that indicates the Video Game Consoles market also satisfies the hypothetical monopolist test. PX5000 at 103. Dr. Lee explained that the aggregate diversion ratio for the Video Games Consoles market would necessarily be greater than or equal to the aggregate diversion ratio for the High-Performance Video Game Consoles market because the hypothetical monopolist of the Video Game Consoles market would own strictly more products than the hypothetical monopolist of the High-Performance Video Game Consoles market.

C. Multi-Game Content Subscription Services Constitute a Relevant Product Market

Brown Shoe - Industry and Public Recognition

255. Market participants view content library services as a distinct product segment. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PX1995 at -008 (Microsoft).

256. Microsoft has represented that it [REDACTED]

[REDACTED]

[REDACTED] PX0003 at -077 (Microsoft Second Request Response).

Brown Shoe – Characteristics, Benefits and Uses

257. Sarah Bond, Microsoft Gaming Corporate Vice President of Creator Experiences and Ecosystem Management, testified that users of Xbox Game Pass value being able to play well-known video game titles through the content library service as well as discovering games that they would not otherwise have played. PX7003 (Bond (Microsoft) IH) at 139:7-19.

258. Subscribing to Game Pass reduces subscribers' cost of playing a wider set of games. In an April 2019 draft email to Take-Two regarding Xbox Game Pass, [REDACTED] [REDACTED] [REDACTED] PX1767 at - 001 (Microsoft).

259. A Microsoft presentation on Xbox Game Pass observes that "[m]embers play 40% more titles after joining Game Pass" and "[m]embers play games across 30% more genres after joining Game Pass." PX4695 at-025-026 (Microsoft).

260. In a July 2021 Earnings Call, Microsoft told investors "Game Pass is growing rapidly and it's transforming how people discover, connect, and play games. Subscribers play approximately 40% more games and spend 50% more than non members." PX9012 at 006

261. In a regulatory submission to the European Commission regarding the Proposed Transaction, the Merging Parties have represented, "By replacing the upfront costs of acquiring individual games with a flat monthly fee, the subscription service allows gamers to discover games they would not otherwise purchase and creates an opportunity for developers to experiment with and monetize new, innovative games." PX0006 at 13 (Microsoft Form CO).

Brown Shoe – District Pricing and Marketing

262. Subscribers to Multi-game content subscription services typically pay periodic subscription fees, frequently monthly, quarterly, or annually, for access to the games offered by the service. The monthly subscription fee for Xbox Game Pass ranges from \$9.99 to \$14.99 per month. The monthly subscription fee for PlayStation Plus Extra and Premium tiers (the content subscription tiers) ranges from \$14.99 to \$17.99. PX8001 (Ryan Dec. (Sony) Decl.)) at ¶ 9. 17.

263. Microsoft has explicitly compared and benchmarked the pricing and features of Xbox Game Pass to Sony's PlayStation Plus. PX1151 at -001 (Microsoft).

1 264. [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]

5 265. [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]

9 266. Microsoft executives have observed that Game Pass is complementary to and not a
 10 substitute for buy-to-play sales. In an email discussing digital sales and subscription
 11 services addressed to a third-party publisher, Sarah Bond, Microsoft Gaming Corporate
 12 Vice President of Creator Experiences and Ecosystem Management, wrote that
 13 “[Microsoft’s] intent with Game Pass (GP) long-term is to be **additive** to the ecosystem.
 14 Our research of subscriptions across media forms has shown that consumers like and use
 15 both models.” PX1767 at -001 (Microsoft) (emphasis in original).

16 ***Brown Shoe – Distinct Customers***

17 267. Buy-to-play games do not facilitate the same discovery of new content among gamers as
 18 content subscription services do. [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED] PX4652 at -007 (Microsoft).

22 ***Brown Shoe – Sensitivity to Price Changes***

23 268. Microsoft observed that Game Pass promotes subscriber engagement and retention. A
 24 2020 Microsoft strategy document [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED] PX1050 at -038 (Microsoft).

1 269. A Microsoft analysis of subscriber acquisition and retention for Game Pass [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 PX4260 at -005 (Microsoft).

7 270. Xbox Live Gold and PlayStation Plus Essential may offer a limited number of free games
8 on a monthly basis, but they do not offer the same diversity of content and game
9 discoverability as content library services, which often offer a library of hundreds of
10 games. Jerrett West, Corporate Vice President of Gaming Marketing at Microsoft,
11 testified that Xbox Live Gold is “currently separate from Game Pass” and “[t]he big
12 difference is Game Pass has a catalog of games. Live Gold is specifically focused on
13 multiplayer gaming. ... We offer free games with Gold every month, and a Game Pass
14 subscriber and a Gold subscriber gets those games with Gold—games that we call them
15 every month, but it’s not the catalog of Game Pass games.” He additionally clarifies that
16 Xbox Live Gold does not offer a catalog of games. PX7005 (West (Microsoft) IH Tr. at
17 20:3–24.

18 271. Companies like Apple sometimes offer access to a content library of games that are
19 primarily played on mobile devices. Mobile games are highly differentiated from video
20 games primarily played on non-mobile devices. PX0006 at -052 (Microsoft Form CO).

21 272. Consumer substitution to products outside of the Content Library Services (otherwise
22 known as multi-game content subscription services) market does not constrain a
23 hypothetical monopolist of Content Library Services from likely profitably implementing
24 a SSNIP. PX5000 at -133. For this reason, a hypothetical monopolist of Content Library
25 Services would likely profitably impose a SSNIP on products within this this market,
26 including Game Pass, and thus, the Content Library Services market satisfies the
27 hypothetical monopolist test. PX5000 at 133-134.

28

D. Cloud Gaming Subscription Services Constitute a Relevant Product Market***Brown Shoe - Industry and Public Recognition***

273. Microsoft identifies Xbox Cloud Gaming as a separate economic entity in its public statements. *See, e.g.*, PX9050, Microsoft Corp. Annual Report Form 10-K (July 28, 2022) at -014 (“Gaming, including Xbox hardware and Xbox content and services, comprising first- and third-party content (including games and in-game content), Xbox Game Pass and other subscriptions, Xbox Cloud Gaming, third-party disc royalties, advertising, and other cloud services”).

274. In Microsoft’s July 2021 earnings call, CEO Satya Nadella stated: “We continue to lead in the fast-growing cloud gaming market with last month -- just last month, we made Xbox Cloud Gaming available on PCs as well as Apple phones and tablets via the browser in 22 countries with more to come.” PX9012 at -006.

275. In internal documents, Microsoft compares xCloud (and, later, Xbox Cloud Gaming) to other cloud gaming streaming services. PX1110 (Microsoft), Email from T. Stuart (Mar. 11, 2020) at -024 (Phil Spencer presentation to Microsoft’s Board identifies the following competitors in a slide titled “Game Streaming Competitive Landscape”: Google Stadia, Sony PlayStation, Nvidia GeForce NOW, and Amazon); PX4640 at -001 (Microsoft) (cloud gaming competitive landscape compares xCloud, Luna, Stadia and GFN).

276. [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

277. Documents from Nvidia analyze cloud game streaming services separately from other methods of game distribution. PX3069 (Nvidia), GFN Review presentation (Jan. 8, 2021) at -008 (comparing subscription pricing on GeForce NOW to subscription pricing on Amazon Luna, PlayStation Now, Stadia Pro, Blade Shadow, and Xbox Game Pass).

278. Documents from [REDACTED]
[REDACTED] PX3206 (Amazon), [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 279. Documents from Google analyze cloud game streaming services separately from other
7 methods of game distribution. PX3058 (Google), Email from N. Betito (Oct. 27, 2020) at
8 001-004 (comparing Stadia to Luna, Nvidia and xCloud).

9 ***Brown Shoe – Characteristics and Uses***

10 280. Cloud Gaming Subscription Services provide a way to play games that is distinct from
11 running them locally on the player's gaming device, by enabling gamers to be playing
12 a game in seconds rather than waiting for games to download or update, and streaming
13 rather than downloading avoids burdening the storage limits on a gaming device.
14 PX0006 (Microsoft) at 088 (“[Cloud gaming] enables gamers to...start gameplay
15 instantaneously without waiting for a game to download to a device...this area is
16 particularly vibrant, with a large number of players.”); PX8000 (Eisler (Nvidia) Decl.) ¶
17 17.

18 281. Cloud Gaming Subscription Services allow gamers to play computationally demanding
19 games on less powerful devices that otherwise lack the computing power or storage to
20 support the games, reducing the need for gamers to make large investments in expensive
21 hardware. <https://www.nvidia.com/en-us/geforce/geforce-experience/>; PX8000 (Eisler
22 (Nvidia) Decl.) ¶¶ 6, 9, 17 (explaining the advantage of permitting gamers to play large
23 and technologically complex games on less powerful devices that otherwise lack the
24 computing power or storage to support the games); PX3103 at -008 (Notes of CMA call
25 with Nvidia, Jan. 9, 2023).

26 282. Cloud Gaming Subscription Services enable gaming on devices that do not meet the
27 minimum specifications for large and technologically complex games, such as older and
28 less expensive PCs, MacBooks, Chromebooks, tablets, mobile devices, and smart TVs.

1 <https://support.xbox.com/en-US/help/games-apps/cloudgaming/about-cloud-gaming;>
2 PX0006 at -088.

3 283. Cloud Gaming Subscription Services enable gamers to play games that were developed
4 for other devices and/or operating systems. [https://support.xbox.com/en-US/help/games-](https://support.xbox.com/en-US/help/games-apps/cloudgaming/about-cloud-gaming;)
5 [apps/cloudgaming/about-cloud-gaming;](https://support.xbox.com/en-US/help/games-apps/cloudgaming/about-cloud-gaming;) PX0006 at -088.

6 284. As an executive with one of the leading cloud gaming services averred, “cloud gaming
7 provides a high-end gaming experience . . . without requiring customers to upgrade the
8 latest graphics card, PC, or console.” PX8000 (Eisler (Nvidia) Decl.) ¶ 9.

9 285. Kareem Choudhry, Microsoft’s former Corporate Vice President for Cloud Gaming,
10 testified that “prior to [xCloud], if you wanted to play an Xbox game, you had to be
11 playing it on an Xbox,” and that xCloud’s goal was to “free that restriction” and “enable
12 more people to play and participate.” PX7002 (Choudhry (Microsoft) IH) at 40:8-18.

13 286. Kareem Choudhry, Microsoft’s former Corporate Vice President for Cloud Gaming,
14 testified that xCloud offers “a visionary statement of the games you want, with the people
15 you want, anywhere you want.” PX7002 (Choudhry (Microsoft) IH) at 40:10-12.

16 287. Kareem Choudhry, Microsoft’s former Corporate Vice President for Cloud Gaming,
17 testified: [REDACTED]

18 [REDACTED]
19 PX7002 (Choudhry (Microsoft) IH) at 116:12-15.

20 288. Sarah Bond, Microsoft’s Corporate Vice President of Gaming Ecosystem, explained:
21 “We believe that the players should be the center of their experience, that you should be
22 able to play your games with who you want on the device you want, where you want. We
23 believe you should be able to start on PC and pick up on console, you should be playing
24 on console and then be able to play on your phone. And xCloud is one of the many
25 capabilities that are required to deliver that experience.” PX7003 (Bond (Microsoft) IH)
26 at 74:4-13.

27 ***Brown Shoe – Unique Production Facilities***

289. Cloud gaming service providers operate on cloud infrastructure, either by deploying their own dedicated infrastructure or by contracting with a third party. *See* PX0003 at -141-42 (Microsoft Second Request Response); PX3272 (Sony) at 016-27.

290. Xbox Cloud Gaming operates on dedicated Xbox console hardware in Microsoft data centers. PX0003-141-42 (Microsoft Second Request Response).

291. Microsoft has invested [REDACTED] in xCloud server capacity. PX1039 at -002 (Microsoft).

292. In January 2022, Microsoft was considering investing [REDACTED] [REDACTED]. PX1039 at -002 (Microsoft).

Brown Shoe – Distinct Prices and Marketing

293. Users access cloud gaming services either by paying a periodic fee (either monthly or yearly) or by streaming free-to-play games (which is available for free on some services). PX0003 at -019; <https://www.xbox.com/en-US/cloud-gaming>; <https://www.nvidia.com/en-us/geforce-now/memberships/>; <https://www.amazon.com/luna/landing-page>; <https://www.playstation.com/en-us/ps-plus/#premium>.

294. Xbox Cloud Gaming marketing highlights the “play anywhere” functionality of cloud gaming, encouraging users to “discover the freedom and flexibility the cloud brings to your gaming experience” with “more choices in how to play” and the ability to “jump in and start playing in seconds.” PX9091 at -001 to -002, Kareem Choudhry, “Cloud Gaming with Xbox Game Pass Ultimate Launches with More Than 150 Games,” XBOX NEWS (Sept. 14, 2020), <https://news.xbox.com/en-us/2020/09/14/cloud-gaming-with-xbox-game-pass-ultimate>.

295. Nvidia GeForce NOW marketing highlights the “play anywhere” functionality of cloud gaming, using the slogan “Your Games. Your Devices. Play Anywhere.” Nvidia, GeForce NOW, <https://www.nvidia.com/en-us/geforce-now/>.

Brown Shoe – Distinct Customers

1 296. Cloud gaming expands the total addressable market for high-end video games by making
2 these games available to customers that do not own high-end Windows gaming PCs or
3 consoles. PX7062, Jeff Fisher Depo (Nvidia), 46:2-47:14.

4 297. When Microsoft introduced Xbox Cloud Gaming, Corporate Vice President for Cloud
5 Gaming Kareem Choudhry announced “cloud gaming as part of Xbox Game Pass
6 Ultimate now opens up the world of Xbox to those who may not own a console at all.”
7 PX9091 at -002, Kareem Choudhry, “Cloud Gaming with Xbox Game Pass Ultimate
8 Launches with More Than 150 Games,” XBOX NEWS (Sept. 14, 2020),
9 <https://news.xbox.com/en-us/2020/09/14/cloud-gaming-with-xbox-game-pass-ultimate>.

10 298. Microsoft has estimated that the total addressable market for cloud gaming is
11 approximately 3 billion users, compared to 200 million console users. PX7011 at 273:3-
12 10; PX9012 at-006.

13 299. Xbox CEO Phil Spencer confirmed that cloud gaming enables Microsoft to reach a
14 distinct customer base, writing in an April 2022 email to the Microsoft Gaming team:
15 “Cloud will be at the vanguard of our expansion to billions of players we have not been
16 able to serve before.” PX1038 (Microsoft), Email from K. Choudhry (Apr. 20, 2022) at -
17 002.

18 300. Microsoft internal documents [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED] PX1025 (Microsoft),
25 Email from C. Gluckstein (May 13, 2022) at -007.

26 301. [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 302. Google has also recognized that cloud gaming appeals to a distinct set of customers and
4 is currently marketing three of its Chromebooks as “cloud gaming machines, disguised as
5 Chromebooks.” Google, “Cloud Gaming Chromebooks,”
6 <https://www.google.com/chromebook/discover/gaming>.

7 303. Dr. Lee opines that the combined qualitative and quantitative evidence supports the
8 conclusion that a hypothetical monopolist owning all cloud gaming services would likely
9 implement a SSNIP on at least one of these products. PX5000 at 137. Hence, the Cloud
10 Gaming Services market satisfies the hypothetical monopolist test. PX5000 at 138.

11 **E. Multi-Game Content Subscription Services and Cloud Gaming Subscription**
12 **Services Together Constitute a Relevant Product Market**

13 304. The market for multi-game content subscription services and cloud gaming subscription
14 services includes all video game subscription services that offer either content library
15 services for games played primarily on non-mobile devices or cloud gaming services for
16 games played primarily on non-mobile devices. PX5000 at -103 (Lee Report).

17 305. Because Microsoft’s Game Pass Ultimate subscription service offers both content library
18 services and cloud gaming services, each product in the multi-game content subscription
19 and cloud gaming subscription services market competes with Game Pass Ultimate on at
20 least one of these services. PX5000 at -103 (Lee Report).

21 306. A hypothetical monopolist of all products in the multi-game content subscription services
22 and cloud gaming subscription services market would likely profitably impose a small
23 but significant non-transitory increase in price that would not be defeated by products
24 outside the market, including buy-to-play games. PX5000 at -127-31 (Lee Report).

25 **F. The Relevant Geographic Market Is the United States**

26 **i. Game Prices and Releases Vary Country-by-country, Supporting the Ability of**
27 **Market Participants to Price Discriminate**
28

307. Console manufacturers set prices on a country-by-country basis. PX5000-104 (Lee Report).
308. Sony raised prices for PlayStation 5 consoles in certain countries, including Canada but not the United States. PX5000-104 (Lee Report).
309. [REDACTED] PX1752-001.
310. Console video games are released on a country-by-country basis, and the exclusivity periods that console makers negotiate with publishers vary from country to country. PX5000-106 (Lee Report); PX2167-023 (Activision); PX2170-015-016 (Activision).
311. Sony negotiates separate software distribution agreements for different geographic regions. PX7048 (Booty (Microsoft) Dep.) at 149:12-150:14.
312. The price that Microsoft sets for Game Pass in the United States differs from the price it sets in other countries. PX5000-138 (Lee Report); PX7005 (West (Microsoft) IH) at 221:18-222:11.
313. Microsoft makes Game Pass PC available in more countries than it does Game Pass for Console or Game Pass Ultimate. PX5000-138 (Lee Report).
314. Availability of Xbox Cloud Gaming varies by country and has expanded to additional countries over time. PX5000-139 (Lee Report).
315. If users “move[] to a different country” or are “already in a region different from the one set for your account and/or console,” they must “change [their] Xbox country/region.” PX5000 at 139 (citing “Update your Microsoft account if you’re moving to a new country or region,” <https://support.xbox.com/en-US/help/account-profile/manage-account/update-microsoft-account-country-region>.)

i. Gamer Preferences and Behavior Vary Country-by-country and Inform Market Participants’ Strategic Decisions

316. Microsoft views the United States as a “core market” and [REDACTED]

[REDACTED] PX5000-106 (Lee Report); PX1721-011 (Microsoft).

317. Microsoft [REDACTED]

[REDACTED] PX7036

(Nadella (Microsoft) Dep.) at 161:6-162:17.

318. Microsoft’s CEO Satya Nadella [REDACTED]

[REDACTED] PX7010 (Nadella (Microsoft) IH) at

185:2-6; PX1274-001.

319. Sony Interactive Entertainment CEO Jim Ryan explained that “console gaming is the more prevalent form of gaming [in the United States] than it is elsewhere in the world.” PX7053 (Ryan (Sony) Dep. Vol. I) at 232:24-233:4.

320. Certain types of games—such as shooter games—are more popular in the United States than in other countries. PX7053 (Ryan (Sony) Dep. Vol. I) at 15:20-16:2.

321. Gamers located in closer proximity to cloud services are likely to experience better cloud gaming performance. PX5000-139 (Lee Report); PX7054 (Ryan (Sony) Dep. Vol. II) at 115:2-13; PX7062 (Fisher (Nvidia) Dep.) at 53:14-54:5.

III. RELATED PRODUCT

A. Activision Content Is an Important Input that Drives Acquisition, Engagement, and Retention

322. Activision has internally called several of its franchises, including *Call of Duty* and *World of Warcraft*, “super franchises” capable of driving platform adoption with “enormous scale and network effects.” PX2107 at -043, -051 (Activision).

323. Activision’s portfolio of games have the ability to influence video game product purchase decisions. When Activision and Nvidia negotiated over offering Activision games on the Nvidia GeForce NOW cloud gaming subscription service, Activision stated “[w]e influence players’ subscription decisions” and “[w]e influence hardware purchase decisions.” PX2159-007 (Activision).

1 324. In an internal Activision analysis describing ongoing negotiations [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED] PX2419-004 (Activision). A similar Activision analysis considering
5 [REDACTED]
6 [REDACTED]” PX2082 at 004 (Activision).
7 That same analysis observed that “[REDACTED]
8 [REDACTED]” PX2082 at
9 004 (Activision).

10 325. In a 2021 presentation, Activision [REDACTED]
11 [REDACTED]
12 [REDACTED]” PX2049-006
13 (Activision).

14 326. In a letter to Phil Spencer summarizing third party relationships, Microsoft executives
15 noted that Activision considers itself an “ultimate ‘kingmaker’” who is entitled to share
16 in “platform economics” in its content agreements. PX1019-009 (Microsoft).

17 327. In December 2020, the Head of Microsoft Studios Matt Booty identified the top drivers
18 of Xbox Game Pass subscriber acquisition for the Xbox leadership team. PX1425-012
19 (Microsoft). [REDACTED]
20 [REDACTED] PX1425-
21 012 (Microsoft); PX5000-172 (Figure 41) (Lee Report).

22 328. [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED] PX2159 at 007
27 (Activision). [REDACTED]
28 [REDACTED]

- 1 [REDACTED]” PX2159 at 007
2 (Activision).
- 3 329. The top five *Call of Duty* titles [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED] PX5000 at -171 to -172 & Figure 41 (Lee Report) (citing PX1425 at -
7 012 (Microsoft)).
- 8 330. An expert analysis of Microsoft and Sony’s sales data [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] PX5000 at -171 (Lee Report).
- 12 331. Microsoft also recognized that Activision’s other franchises also drove sales, retention,
13 and engagement. In their financial modeling of the proposed acquisition, [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] PX7007 (Stuart (Microsoft) IH) at 98:11-99:17.
- 17 332. Microsoft’s [REDACTED]
18 [REDACTED]
19 [REDACTED] PX7011 (Spencer (Microsoft) IH
20 Vol. I) at 117:20-118:13.
- 21 333. Microsoft offered Activision [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED] PX7011 (Spencer (Microsoft) IH Vol. I) at 118:14-119:10.
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED] PX1245 at -001 (Microsoft).

334. Sony CEO Jim Ryan similarly identified the *Overwatch* and *Diablo* franchises as part of Activision's "stronger portfolio of games." PX7053 (Ryan (Sony) Dep.) at 48:10-49:11.

335. The *Call of Duty* franchise is one of the most recognizable and popular video game series. [REDACTED]

336. [REDACTED]

337. One way Activision's portfolio drives acquisition, engagement, and retention is by tying their top franchises to esports, which are online multiplayer leagues similar to professional sports teams. PX7052 (Zerza (Activision) Dep.) at 215:12-16. Activision organizes leagues in which professional gamers compete in *Overwatch* and *Call of Duty* matches to build community among the franchise's loyal fanbase, which furthers Activision's opportunities for monetization. PX7052 (Zerza (Activision) Dep.) at 215:17-216:4; PX2107 at -056 (Activision) ("We also continue to lead the industry in rolling our professional, global city-based esports leagues for key franchises.").

338. [REDACTED]
[REDACTED]
PX1742-003 (Microsoft); PX7003 (Bond (Microsoft) IH) at 110:11 – 110:23 [REDACTED]
[REDACTED]; 218:24-219:4; PX7007 (Stuart (Microsoft) IH) at 67:8-11; PX7011 (Spencer (Microsoft) IH Vol. I) at 88:12-13; PX7008 (Schnakenberg (Activision) IH) at 59:16-22; PX2157-005 (Activision); PX7052 (Zerza (Activision) Depo. Tr). at 203:24-204:2 [REDACTED]

IV. THE PROPOSED ACQUISITION IS LIKELY TO RESULT IN A SUBSTANTIAL LESSENING OF COMPETITION

A. Microsoft Would Have the Ability to Foreclose Rivals in the Relevant Markets

339. Today, Activision has the ability to control whether and how its content is delivered. PX2049 (Activision) at 006. Post-transaction, Microsoft would gain that ability to control whether and how Activision content is provided to Microsoft's competitors.
340. Microsoft would gain the ability to totally withhold Activision content from Microsoft's competitors. PX7031 (Greenberg (Microsoft) Dep.) at 42:3-11 (confirming any publisher or developer can determine on what platforms its content is available).
341. Microsoft would gain the ability to partially withhold Activision content from Microsoft's competitors. *See* PX7031 (Greenberg (Microsoft) Dep.) at 42:3-11.
342. Partial foreclosure strategies include 1) timed exclusivity, where Microsoft could delay the release of Activision games on competing products, 2) content exclusivity, where Microsoft makes certain versions or add-on content for Activision games exclusive to Microsoft products, and 3) degraded content, where Microsoft degrades the performance, gameplay, or features of Activision games. PX5000 (Lee Report) at 181.
343. [REDACTED] PX1015 (Microsoft) at -027.
344. Microsoft ordinarily withholds first-party games from competitors after acquisition. *See* PX7031 (Greenberg (Microsoft) Deposition) 47:7-49:13; 53:19-54:21 (collecting examples).
345. Microsoft's strategy after acquiring studios is not to offer first-party content on rival consoles. PX1949 (Microsoft) at 1.

B. Unlike an Independent Activision, the Combined Firm Would Have an Incentive to Foreclose in the Relevant Markets

1. The Combined Firm Will Have an Increased Incentive to Foreclose in High-Performance Consoles and Video Game Consoles

346. Microsoft has the incentive to foreclose Activision content from PlayStation consoles due to the impact of such foreclosure across the entirety of the Microsoft Xbox ecosystem, which includes a host of complementary products, including Xbox consoles, Xbox cloud gaming services, hardware accessories for Xbox products and services, Xbox subscription services, and games for which Microsoft receives a portion of the revenue on each sale. PX5000 at -019 (Lee Report); PX0003 at -019-020, 047, 052-053 (Microsoft Second Request Response).

347. If Microsoft forecloses Activision's content from PlayStation consoles, consumers—who would otherwise purchase or remain playing on PlayStation—are more likely to purchase a new Xbox Series console instead. These new Xbox console owners generate additional profits for Microsoft through content, accessory, and subscription service sales. PX4631-011 (Microsoft).

348. Dr. Robin Lee's quantitative economic analysis shows that the combined firm would likely have an incentive to engage in the foreclosure of acquired Activision content from PlayStation consoles. PX5000 at -215 (Lee Report). Dr. Lee's model predicts that the combined firm would incur substantial costs by foreclosing PlayStation consoles, but these costs are more than offset by the benefit of bringing additional gamers to Xbox consoles and Xbox Game Pass—which provide Microsoft additional sales of complementary products. PX5000 at -215 (Lee Report). Therefore, Dr. Lee predicts that Microsoft would recoup more than 100% of its lost profits from foreclosing Activision's content and the substantial benefits that Microsoft would incur as a result of bringing additional players to Xbox consoles and adding Activision content to Game Pass would have the effect of also making foreclosure more valuable to Microsoft. PX5000 at -215 (Lee Report).

1 349.

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 PX1759 at 001 (Microsoft). [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] PX1759 at 001 (Microsoft).

10 350. Internally, [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 PX4007 at-006 (Microsoft).

16 351. Microsoft has reached a similar conclusion that favors foreclosure of content from
17 PlayStation consoles in its analyses of other potential and actual mergers. An internal
18 Microsoft email, when analyzing a potential acquisition of Electronic Arts, observed:
19 “There are intangible benefits to owning EA as well – being the only subscription within
20 which you get access to EA’s games, as an example, has significant marketing value and
21 helps us carve out a differentiated position competitively.” PX1012 at -002 (Microsoft).

22 352. Microsoft has recognized [REDACTED] in its
23 analysis of acquiring Square Enix. In a November 2019 presentation examining
24 “Exclusivity Modeling Scenarios” for a potential acquisition of Square Enix, referred to
25 as Project Phoenix, Microsoft executives noted a positive impact from taking content
26 exclusive, arising from greater Xbox console sales and “[d]ual [c]onsole [o]wners . . .
27 will shift purchases to Xbox if Phoenix [Square Enix] titles become exclusive to Xbox.”
28 PX1136 at -015.

353. Microsoft also realizes long-term strategic benefits from the foreclosure of rival consoles from Activision content. In an April 2021 presentation with other members of the Xbox team, Senior Xbox Games Business planner Diarmuid Murphy [REDACTED] [REDACTED] [REDACTED]. PX1471 (Microsoft); PX4602 at 27:8-28:5. [REDACTED] [REDACTED] PX4602 at 30:8-24 (Microsoft).

354. Microsoft's presentation to the Board of Directors about the acquisition notes that one of the "[o]ther strategic benefits" of the acquisition is the "Xbox console ecosystem." PX1741 at -014 (Microsoft). [REDACTED] [REDACTED] [REDACTED] PX7011 (Spencer (Microsoft) IH Vol. I) at 35:11-36:14.

355. Microsoft executives and documents acknowledge that consumers' beliefs and expectations are affected by the type and amount of exclusive content on Xbox, such that more and higher quality exclusive content likely would lead to greater sales of consoles and complementary products for Microsoft. PX7003 (Bond (Microsoft)) IH Tr. at 54:1-55:18 ("there are a set of players that value the idea that they can play [a] game only on Xbox"); PX7014 (Booty (Microsoft)) IH Tr. at 186:6-187:8 (console owners put importance on exclusive content).

356. A model of consumer demand for consoles and titles estimated by Dr. Robin Lee using historical Microsoft sales data predicts an average share shift of 8.9% toward Microsoft from making *Call of Duty* titles exclusive, and a smaller but significant shift toward Microsoft from making other Activision titles exclusive. PX5000-156 to -158 (Lee Report); [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 357. Microsoft's internal documents support the conclusion of Dr. Lee's consumer demand
4 model that shows sufficient numbers of gamers would switch from playing Activision
5 titles on PlayStation to playing them on Xbox. A 2019 Microsoft document considering
6 the potential acquisition of Square Enix explains that "having access to relevant content
7 is one of the single most important drivers in both console growth (where an exclusive
8 AAA release accounts for a 2-4% console share shift in the US and a 1-3% shift
9 worldwide)." PX1136 at -004 (Microsoft).

10 358. The combined firm is also incentivized to partially foreclose or degrade Activision
11 content on PlayStation consoles for the same reasons that it has to remove games entirely
12 from PlayStation. Sony's CEO, Jim Ryan, explains that "As an independent company,
13 Activision is incentivized to make great games on all platforms." PX7053 (Ryan (Sony)
14 Dep.) at 36:7-13. Post-acquisition, however, the combined firm will have an interest in
15 optimizing Xbox business by disadvantaging PlayStation consoles to drive gamers to
16 Xbox platforms and thereby removing the ability of PlayStation gamers to access
17 Activision content on their preferred console. PX7053 (Ryan (Sony) Dep.) at 54:2-13;
18 *see* PX7053 (Ryan (Sony) Dep.) at 67:7-13 ("Call of Duty gamers are extremely
19 demanding and they would go very quickly where the best version of Call of Duty was to
20 be found available.").

21 359. [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED] PX4505 at
25 002 (Microsoft).

26 360. [REDACTED]
27 [REDACTED]
28 [REDACTED]

PX2049 at 006 (Activision). [REDACTED]

[REDACTED] " PX2049 at 006 (Activision).

**2. The Combined Firm Will Have an Increased Incentive to Foreclose in
Content Subscription Services and Cloud Gaming Services**

361. Several Microsoft documents explicitly reference longer-term benefits of gaining scale in content library and cloud gaming service markets.

362. [REDACTED]

[REDACTED] PX1049-003 (Microsoft).

363. A July 2020 Microsoft presentation intended for the Board of Directors describing the thesis of the ZeniMax acquisition highlighted the virtuous cycle displayed by gaining more subscribers to Xbox Game Pass: "In subscriptions, scale is self-reinforcing; jumpstarting the virtuous cycle between content and subscribers is our imperative. ... Xbox Game Pass faces increasing competition; our window to scale subscribers & accelerate this virtuous cycle is narrowing[.] ... Acquiring ZeniMax would unlock nonlinear growth for Xbox Game Pass, establishing a long-term economic beachhead." PX1050-004 (Microsoft).

364. A 2021 email from Senior Marketing Director of Xbox Guy Welch drew comparisons with video subscription services like Netflix and noted [REDACTED]

[REDACTED] PX1877-001

(Microsoft) (emphasis in original).

1 365. An internal email exchange [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 PX4267-003 (Microsoft).

8 366. Microsoft's statements and internal documents recognizing the company's incentive to

9 withhold content from rival content library services providers are consistent with actions

10 and statement Microsoft made for prior acquisitions, and in the case of Minecraft and

11 ZeniMax, executed.

12 367. Microsoft Gaming CEO Phil Spencer, in a September 2021 email to members of Gaming

13 Leadership team, wrote, "We have not allowed Minecraft to support PSNow as we do see

14 PSNow as competition to XGP and don't need to support their financial position with

15 PSNow which would just allow them to compete more effectively with XGP." PX1897-

16 001 (Microsoft).

17 368. In an email discussing [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 PX1065-002 (Microsoft). [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED] PX1065-008 (Microsoft).

24 369. [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 PX1313 at -002 (Microsoft).

28

370. Microsoft noted in its regulatory filings to the European Commission regarding the ZeniMax acquisition that “Microsoft will make all acquired games and future releases available to subscribers of its Game Pass service on the day the games are launched (which can be used to play on PCs, Xbox consoles and Android mobiles), but does not currently anticipate distributing them through other subscription services.” PX1651-013, -014 (Microsoft ZeniMax Form CO).

371. The quality of cloud gaming has improved dramatically in recent years. PX8000, Eisler (NVIDIA) Declaration at ¶ 7; PX7062, Fisher (NVIDIA) Dep. at 51:13-51:21. Cloud publishers can add new content and fix bugs in the cloud, which saves gamers time, effort and data. PX8000, Eisler Declaration at ¶ 11.

372. Cloud gaming has a profitable future. PX7062, Fisher (NVIDIA) Dep. at 63:19-63:20 (“It’s my strong belief that cloud gaming has a profitable future, yes.”). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX1517-008.

373. Microsoft is well-positioned to grow in the cloud gaming market. Microsoft owns a large portfolio of first-party games and has established relationships with third party publishers, both of which provide content for the xCloud gaming service. PX0003 at 016-019.

374. xCloud is the leading cloud gaming service: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX1037 at 041 (Microsoft).

375. Microsoft is also one of a limited set of companies that has cloud computing infrastructure with global coverage. Microsoft has already taken advantage of Azure in various ways to build out its cloud gaming service, including by placing the Xbox Cloud Gaming custom hardware [REDACTED] in Azure datacenters, leveraging

Azure's hardware design and datacenter design, and using Azure services for backend support for Xbox Cloud Gaming. PX7050, Choudry (Microsoft) Dep. at 64:7-13, 154:21-155:20, 158:3-160:4. Microsoft has identified the global coverage of its cloud infrastructure as a competitive strength for its cloud gaming service, PX1029-024 (Microsoft), and predicts that [REDACTED] [REDACTED] PX1037-007 (Microsoft).

376. Microsoft has indicated its willingness to foreclose rival cloud streaming services from its first-party content. For example, in March 2021, Head of Xbox Game Studios Matt Booty wrote in an email that "[w]e have pulled all [Xbox Game Studios] titles from GeForce now so as to not compete with xCloud." PX4351-002 (Microsoft). The content that Microsoft pulled included popular games that Microsoft had previously acquired, including Minecraft. PX7060, Eisler (NVIDIA) Dep. Tr. 99:16-100:3.

377. Also in March 2021, Microsoft was in discussions [REDACTED] [REDACTED] [REDACTED] In response, Mr. Booty wrote, [REDACTED] [REDACTED] we are NOT putting our first party IP on competing streaming or subscription services. Point him at me or have him talk to Sarah [Bond] about it if he needs a more firm 'no effing way'." PX4351-001 (Microsoft).

378. [REDACTED] [REDACTED] [REDACTED] PX4818-013 (Microsoft); PX7050, Choudry (Microsoft) Dep. at 189:12-190:11. [REDACTED] [REDACTED] [REDACTED] [REDACTED] . PX4181-083 (Microsoft). [REDACTED] [REDACTED] [REDACTED] . PX7050 (Choudhry (Microsoft) Depo) at 198:22-201:25; PX4181-083.

**3. The Combined Firm Will Have Increased Incentive to Collaborate on
Innovations with Only Microsoft in the Relevant Markets**

379. Hardware providers work closely with video game developers. *See* PX7062 (Fisher (NVIDIA) Depo), 20:13-20:18 (“When Nvidia is developing and launching a new series of GPUs for gaming, does Nvidia’s gaming business work with game developers to optimize the work -- the interplay between the game -- a game and the new chipset. A: We do, yes.”)

380. As Jim Ryan, CEO of Sony Interactive Entertainment, put it, “So from an early stage in the development of our future consoles we consult with the most valued and prestigious development partners to get their input into what features our next generation hardware should offer.” PX7053 (Ryan (Sony) Deposition) at 31:11-15.

381. In particular, hardware providers have acknowledged that “over the past two decades, Activision has been an important development partner,” collaborating closely with console manufacturers. PX8001 (Ryan (Sony) Declaration) at 015; *see also* PX7061 (Fisher (NVIDIA) Depo 37:2-37:8) (Q: Okay. Do you have an understanding of how long there has been a collaborative relationship between Nvidia and Activision to make Nvidia games performant on Nvidia GPUs? A: It's been some number of years. I don't recall when -- when we first started working with Activision or Blizzard as separate companies.).

382. [REDACTED]

383. [REDACTED] *See also* PX7062 (Fisher (NVIDIA) Depo (PX7062), 20:20-21:21) (“[T]he most common reason is for interplayability to make sure that the game is fully compatible with

1 our . . . newest device. . . the other reason most common is that with our new
2 architectures, we add additional features that games can take advantage of. And we need
3 to teach game developers and work with them so they understand how to modify their
4 games to take advantage of the latest features in our . . . GPUs.”)

5 384. For example, Nvidia, which sells the cloud streaming service GeForce Now, has
6 produced technology to reduce latency when streaming a game. For a game to take
7 advantage of the technology that Nvidia offers, it requires collaboration between Nvidia
8 and the game developer. PX7062 (Fisher (NVIDIA) Depo 22:23-23:21)

9 385. [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 386. The acquisition of a major publisher would jeopardize this relationship. As Mr. Ryan put
14 it, “We simply could not run the risk of a company that was owned by a direct competitor
15 having access to that information.” PX7053 (Ryan (Sony) Deposition) at 34:16-24; *see*
16 *also* PX1486-002 (Microsoft); PX7014 (Booty (Microsoft), 174:20-175:16) (answering
17 why Microsoft should be prepared for Sony to take back dev kits when the deal is
18 announced, “Well, if you have a development kit, you have access to the inner workings
19 of the hardware of the console. In this time period of where were we again in August of
20 2020, right, is that the date on this? But that console would not have been launched yet to
21 the public, so the assumption is that Sony would not want us being able to analyze or pick
22 apart their console prior to its public launch and then if we acquired the studio, then we
23 would then be able to go in and have access to that equipment.”); *see also* PX7014,
24 (Booty (Microsoft) IH 176:22-176:25, (“So, the assumption here was that Sony would
25 not want Xbox to have a window into the details of their new console before it had
26 launched to the public.”).

27 387. This would also affect Activision’s incentives to work with other platforms. PX7053
28 (Ryan (Sony) Deposition at 35:18-36:13.

C. Microsoft's Past Statements and Actions Demonstrate Microsoft has the Ability and Incentive to Foreclose Rivals Post-Acquisition

1. Microsoft is Willing to Lose Money on First-party Exclusive Titles and Treat Them as a "Loss Leader."

388. There is significant evidence that Microsoft considers the benefits of foreclosing rivals from content when deciding whether to make content exclusive for its consoles and Xbox Game Pass subscription services. *See* PX7007 (Stuart (Microsoft) IH at 167:22-168:9 (Q: What does it mean to define differentiated content as exclusive to the service? A: "As with any subscription service or any content service writ large having content that is exclusive to that service is an optimal reason or optimal way to attract customers into that service.)).

389. [REDACTED]
 [REDACTED] PX4007 at -005 (Microsoft) [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] PX4007 at -006 (Microsoft) [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

2. Past Acquisitions

390. Microsoft's discussion and actions surrounding proposed and consummated acquisitions of video game studios also indicate Microsoft's willingness to forgo profits on content sales to obtain benefits arising from content exclusivity, which is economically rational if the benefits of exclusivity outweigh the foregone sales on other gaming platforms. This has been the case even for new titles that are

released in existing franchises.

391. For example, Microsoft acquired a series of game studios in 2018 and 2019, including Ninja Theory, Double Fine, Obsidian Entertainment (“Obsidian”), and inXile Entertainment. (PX0003 at -086–087 (Microsoft FTC Second Request response, Jul. 1, 2022)).

392. Microsoft’s internal documents state that although existing commitments to other platforms would be honored, “going forward these new studios will focus on making games on our console and we have no plans to expand our exclusive first party IP to other consoles.” PX1949 at -002 (Microsoft) (Greenberg email correspondence, Aug. 19, 2019); PX1951 at -007 (Microsoft) (email correspondence, Aug. 22, 2019). *See also* PX1950 at -001 (Microsoft) (email correspondence, Aug. 2019). (“[N]ew studios we have acquired will focus on our platforms. Next Hellblade, next Outer Worlds, etc will come to Xbox console, PC, gamepass, etc.”).

393. For example, *Hellblade 2* from Ninja Theory will launch exclusive to Xbox, as will Obsidian’s *Outer Worlds 2*. PX7031, Greenberg (Microsoft) Depo. Tr. at 48:11–49:13, 54:6–21.

394. Obsidian games *Grounded* (which offers multiplayer play) and *Pentiment* were launched in 2022 and are exclusive to Xbox. PX7031, Greenberg (Microsoft) Depo. Tr. at 56:2–24.

395. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] PX1805 at 013
(Microsoft); 015. [REDACTED]
[REDACTED]

3. ZeniMax

396. In addition, Microsoft's actions following the acquisition of ZeniMax Media ("ZeniMax") are consistent with Microsoft recognizing that it obtains significant benefits from exclusivity.

397. ZeniMax is the parent company of Bethesda Softworks, which is a game publisher and also includes eight game development studios. PX7049 Hines (Microsoft) Dep. Tr. at 8:17-23. ZeniMax makes "big AAA tentpole launches that when [ZeniMax] put[s] out a game, people stop and pay attention if they're a gamer." PX7049 (Hines (Microsoft) Dep.) at 269:5-16. ZeniMax's games include popular franchises such as Elder Scrolls and Doom, as well as eagerly anticipated new releases such as Starfield. PX4627 at 001.

398. In September 2020, Microsoft announced it was acquiring ZeniMax for \$7.5 billion. PX1962 at 002 (Microsoft).

399. Prior to being acquired by Microsoft, ZeniMax had historically released its games on both Xbox and PlayStation. PX7053 (Ryan (Sony) Dep.) at 28:9-15.

400. In announcing the ZeniMax acquisition, Microsoft publicly stated that it would decide whether to make future ZeniMax releases exclusive to Xbox on a "case-by-case basis." PX1962 at 002 (Microsoft).

401. On the morning the ZeniMax acquisition was announced, Microsoft Gaming CEO Phil Spencer wrote a global email to Microsoft Gaming employees: "Our studio acquisition strategy has been to invest in a long-term plan and to have a consistent pipeline of **quality, exclusive games** for fans, and enriching the Xbox Game Pass portfolio." PX1527 at -002 (Microsoft) (emphasis added).

402. [REDACTED]

[REDACTED] See PX1954 (Microsoft) [REDACTED]

[REDACTED] PX7042 [REDACTED]

403. This internal process to evaluate ZeniMax exclusivity was undertaken pursuant to a PLAINTIFF'S INITIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW, CASE NO. 3:23-CV-2880

1 directive from Phil Spencer. Booty Deposition PX7048 at 8-18; Lawver Deposition
2 at 257:21 -258:2; PX1954 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 404. In the meantime, Microsoft informed the European Commission that it had “strong
7 incentives to continue making ZeniMax games available for rival consoles (and
8 their related storefronts)” and that it would be “implausible” to earn enough new
9 Xbox console users to offset the losses it would realize from lost sales on
10 competing platforms due to an exclusive strategy. Notably, Microsoft cited to the
11 “relative value of ZeniMax games compared to the gaming landscape” as one
12 factor contributing to this conclusion. *See* PX9036 (European Commission
13 Decision, Case M.10001 *Microsoft/ZeniMax* (May 3, 2021) at 21, *available at*
14 https://ec.europa.eu/competition/mergers/cases1/202124/m10001_438_3.pdf);
15 PX1651 at 125-29 (Microsoft Form CO submitted to the European Commission for
16 Microsoft/ZeniMax , Jan. 29, 2021).

17 405. Microsoft models their deals showing the content will be multiplatform. PX4672 at -001
18 (Microsoft) [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 406. The results of the ZeniMax exclusivity analysis were presented to members of the
23 Xbox Gaming Leadership Team in February 2021. PX1966 (Microsoft) (Teams
24 Chat; Feb. 9, 2021); PX7048 (Booty (Microsoft) Dep.) at 31:7-9; 33:11-22;
25 PX7042 (Stuart (Microsoft) Dep.) at 302:14-303:14. *See also* PX1519 (Microsoft)
26 (Email M. Booty to GLT Feb 05, 2021, Tuesday presentation on future ZeniMax
27 title options); PX4535 (Microsoft), (Email M. Booty to S. Sevilla, Jan. 19, 2021
28 (M. Booty scheduling the Neutrino GLT meeting); PX7056 (Murphy (Microsoft)

Dep.) at 135:13-15.

407. Five potential scenarios were presented to the Xbox Gaming Leadership Team, ranging from fully multiplatform (Scenario 1) to fully exclusive (Scenario 5). PX1966 at 008 (Microsoft) (Teams Chat and attachment; Feb. 9, 2021); PX4484 at 009 (Microsoft).

408. In this analysis, all five scenarios modeled by Microsoft, [REDACTED]

[REDACTED] PX4484 at 009, 011 (Microsoft) [REDACTED]

409. At the February 2021 presentation of the ZeniMax exclusivity analysis, Xbox CEO Phil Spencer indicated a preference for Scenario 5, the fully exclusive option. PX1966 at 002 (Microsoft) (Teams Chat and attachment; Feb. 9, 2021) (Xbox CFO Tim Stuart: “Phil has already decided,” Xbox marketing executive Aaron Greenberg: “High ‘FIVE’ Phil.”).

410. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] See PX1471 at -024 (Microsoft) [REDACTED]
[REDACTED]

411. Following the presentation to the Gaming Leadership Team, Microsoft Gaming CFO Tim Stuart sent an email on February 10, 2021, to Mr. Murphy, Xbox Chief Marketing Officer Jerret West, and Head of Xbox Game Studios Matt Booty and added to the email chain two members of the Xbox finance team, Jamie Lawver and Kelsey Huschka, to “run this through the acquisition model,” adding “[w]hat we will need to prove out over the 10 year life of the model: Decreased units [REDACTED]
[REDACTED]
[REDACTED]

at -001 (Microsoft) (email correspondence and attachment, Feb. 2021). *See also* PX7040 (Stuart (Microsoft) Deposition 323:18-23; PX7042 (Lawver (Microsoft) Deposition, 263:4-20; 264:22-25; 265-22-266:3.

412. This financial analysis found the “Xbox-Focused” strategy to drop the value of ZeniMax [REDACTED] PX1116 at -001 [REDACTED] PX7040 (Stuart (Microsoft) Deposition at 327:17-20; 328:14-20; PX7043 (Lawver (Microsoft) Deposition (Corporate Rep) at 14:10-19; *see also* PX4672 at -001 (Microsoft) [REDACTED]

413. Nevertheless, following the acquisition, Microsoft announced that it planned to release several highly-anticipated future ZeniMax titles, including *Starfield* and *Redfall*, exclusively on Xbox and PC. *See* PX7012 (Spencer (Microsoft) IH at 406:23-24; 412:7-13; PX7040 (Stuart (Microsoft) Deposition at 340:6-9; 288:10-289:11; 338:4-7; PX4323 at 003 (Microsoft); *See also* PX4672 at -001 (Microsoft) [REDACTED]

414. [REDACTED] PX7012 Spencer (Microsoft) IH at 412:7-13; PX7040 (Stuart (Microsoft) Deposition at 333:7-17; PX4819 (Microsoft) [REDACTED] PX7042 (Lawver (Microsoft) Depo at 309:16-310:11; PX7007 (Stuart (Microsoft) IH at 280:20-22

415. Prior to the ZeniMax transaction, *Starfield* and *Redfall* were originally planned for

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1 release on PlayStation 5 consoles. PX7042, Lawver (Microsoft) Depo. Tr. at
 2 348:19–349:3, 360:13–20 (“Q. Do you know whether Starfield and Redfall were
 3 set to be on PlayStation before ZeniMax was acquired? ... A. My understanding
 4 would be that it would be expected to be on all platforms, yes.”); PX4430 at -005
 5 (Microsoft) (Project Redfall financial materials, Mar. 2022); PX4303 at -005
 6 (Microsoft) (email correspondence, Sep. 2020). *See also* PX4435 at -001, -012
 7 (Microsoft) (email correspondence and attachments, Feb. 2022); PX7042 (Lawver)
 8 (Microsoft) Deposition at 358:16—359:10.

9 416. Following clearance by the European Commission on March 8, 2021, Microsoft
 10 closed the ZeniMax transaction. In a press release on March 9, Microsoft Gaming
 11 CEO Phil Spencer stated that some future ZeniMax titles would be exclusive.
 12 “With the addition of the Bethesda creative teams, gamers should know that Xbox
 13 consoles, PC, and Game Pass will be the best place to experience new Bethesda
 14 games, including some new titles in the future that will be exclusive to Xbox and
 15 PC players.” Phil Spencer, “Officially Welcoming Bethesda to Team Xbox,” Xbox
 16 Wire, Mar. 2021, [https://news.xbox.com/en-us/2021/03/09/officially-welcoming-](https://news.xbox.com/en-us/2021/03/09/officially-welcoming-bethesda-to-the-xbox-family/)
 17 [bethesda-to-the-xbox-family/](https://news.xbox.com/en-us/2021/03/09/officially-welcoming-bethesda-to-the-xbox-family/).

18 417. Subsequently, Microsoft announced publicly they intended to release Elder Scrolls
 19 VI as an Xbox exclusive. Mr. Spencer testified that “I have made public
 20 statements that Elder Scrolls 6 will be exclusive to Xbox and PC.” PX7012,
 21 Investigational Hearing of Phil Spencer (Microsoft), Volume II, Oct. 12, 2022 at
 22 426:4–12; PX4309 at -001 (Microsoft) (chat transcript, Nov. 2021); PX7042
 23 (Lawver (Microsoft) Deposition 324 9-12; PX0027 (Microsoft), Supplemental
 24 Response to Spec 20(d)-(e), (Sept. 2, 2022) at 003; PX9095, Sam White, “How
 25 Xbox outgrew the console: inside Phil Spencer’s multi-billion dollar gamble,” GQ
 26 UK (Nov. 15, 2021) at -016-017

27 418. [REDACTED]
 28 [REDACTED]

PX4793 (Microsoft); PX4792 (Microsoft); PX7042 (Lawver (Microsoft) Depo at 314:10-16; 309:16-310:11; 343:16-19. PX4818 (Microsoft) [REDACTED]

419. Additionally, in August 2021, Microsoft Gaming CFO Tim Stuart made statements consistent with a desire to prioritize the quality of Bethesda content on Microsoft's own products, even if they were not withheld from rivals: "[W]hat we want is we want that content, in the long run, to be either first or better or best or pick your differentiated experience, on our platforms. We will want Bethesda content to show up the best as – on our platforms." PX9330 Matt Kim, "Microsoft Wants Bethesda Games 'First or Better or Best' on Xbox," IGN, Aug. 16, 2021 <https://www.ign.com/articles/xbox-bethesda-first-better-best/>.

420. In November 2021, Phil Spencer informed Jamie Leder and ZeniMax that he wanted "ALL" ZeniMax games to be exclusive going forward, not just new IP. PX4334 (Microsoft) (chat transcript, Nov. 2021); PX4309 at -001 (Microsoft) (chat transcript, Nov. 2021). [REDACTED]

[REDACTED] PX7042, Lawver (Microsoft) Depo. at 320:4-24, 327:10-328:5, 331:13-336:13; PX4309 at -001 (Microsoft) (chat transcript, Nov. 2021); PX4334 (Microsoft) [REDACTED]

[REDACTED] PX7042, Lawver (Microsoft) Depo. at 318:10-320:24, 326:4-328:19; 330:3-331:7.

421. [REDACTED] PX7042 (Lawver (Microsoft) Depo at 342:13-344:23.

422. [REDACTED]

[REDACTED] PX4818 (Microsoft) [REDACTED]

423. Out of the 24 games that have been released from the eight studios that Microsoft has acquired since 2018, only six have been released on PlayStation. PX0027 (Microsoft Supplemental Response to Request for Additional Information from F.T.C.).
424. Four of those games were released on PlayStation due to preexisting agreements between the acquired studio and PlayStation. PX0027 (Microsoft Supplemental Response to Request for Additional Information from F.T.C.); PX7053 (Ryan (Sony) Depo Vol.1) at 29:8-29:21; PX7031 (Greenberg (Microsoft) Depo.) at 84:23-85:2) (ZeniMax had preexisting contracts with Sony to release the games Ghostwire and Deathloop on PlayStation as timed exclusives); PX7031 (Greenberg (Microsoft) Dep.) at 52:30-53:13, 66:24-67:15 [REDACTED]
[REDACTED]
[REDACTED] The two other games are The Elder Scrolls Online and Fallout 76, both older open-world service games that have continued to receive content updates, but which were released before Microsoft's acquisition of ZeniMax. PX0027 at 004 (Microsoft Supplemental Response to Request for Additional Information from F.T.C.); *see also* PX7031 at 101:19-104:1 (describing open-world service games).

4. Minecraft is Not Predictive of Microsoft's Behavior Here

425. In 2014, Microsoft acquired Mojang, the developer of Minecraft. PX7014 (Booty (Microsoft) IH) at 106:3-5.
426. Minecraft is played across many different kinds of devices, including mobile phones, tablets, and the Nintendo Switch, and is available on more devices than Call of Duty. PX0003 at 132; PX7010 (Nadella (Microsoft) IH) at 17:24-18:4. Unlike Call of Duty, Minecraft was made by a single developer incurring relatively limited costs. PX0003 at 072.
427. At the time of Microsoft's acquisition of Mojang, Mojang had already released a version of Minecraft on Sony's PlayStation consoles. PX0003 at 132.
428. Minecraft is a sandbox game in which users can create a world within the game,

which focuses on user-driven experiences, creativity, and freedom rather than preset goals or a narrative storyline. PX7049 (Hines (Microsoft) Dep.) at 286:12-20. In the words of a Microsoft executive, Minecraft is “a giant untethered, like, players can go and do whatever they want, create their own servers...it’s an amazing sandbox game that’s just different from anything anybody else made.” PX7049 (Hines (Microsoft) Dep.) at 286:12-20.

429. Minecraft is a “service-based game.” PX7042 (Lawver (Microsoft) Dep.) at 90:12-15. Also known as “game as a service,” games like Minecraft has a development team consistently adding new content to the game to keep it fresh and new.” PX7031 (Greenberg (Microsoft) Dep.) at 102:17-103:6. While other games, such as games in Microsoft’s first-party *Gears of War* franchise, may possess a single-player game mode and a multiplayer game mode, they do not “keep developing the game as an online service and experience.” PX7031 (Greenberg (Microsoft) Dep.) at 102:17-103:6.

430. As a result, unlike franchises possessing numerous sequels like Call of Duty or Diablo to progress a story, Minecraft does not release “sequels” and new versions of Minecraft tend to be more akin to updates to the existing game. PX7007 (Stuart (Microsoft) IH) at 307:22-308:2; PX7004 (Zerza (Activision) IH) at 77:2-4 [REDACTED]

[REDACTED] PX7006 (Kotick (Activision) IH) at 53:2-5

[REDACTED] PX7012 (Spencer (Microsoft) IH (Vol. II)) at 421:14-20 [REDACTED]

431. While Call of Duty is unique in that its franchise comprises three separate storylines, PX8001 (Ryan Dec.) at ¶ 25, each annually released game in the series

1 is far more than an “update” to an existing game. Each is a true standalone game to
 2 preceding titles in the franchise. PX7053 (Ryan (Sony) Dep.) at 52:9-12 (“[Call of
 3 Duty games] have different themes. They have different story lines. They have
 4 different game play. They’re made by different studios.”).

5 432. Minecraft’s unique and differentiated approach to gaming has led it to develop a
 6 gamer audience distinct from typical Xbox and PlayStation gamers. In an internal
 7 email, [REDACTED]
 8 [REDACTED]
 9 PX4712 at 001. [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED] PX4712 at
 13 001.

14 433. Microsoft executives recognized Minecraft’s unique status in a messaging app chat
 15 thread about making ZeniMax-acquired games exclusive to Xbox platforms,
 16 “Minecraft being on all platforms enables its mass mass mass market, imo. But
 17 that’s the Minecraft world. I think its different for [ZeniMax] games.” PX1966 at
 18 006. That same chat explained how the nature of service-based games like
 19 Minecraft affected their commercial strategy regarding exclusivity: [REDACTED]

20 [REDACTED]
 21 [REDACTED] PX1966 at 005.
 22 434. [REDACTED]
 23 [REDACTED] PX7056
 24 (Murphy (Microsoft) Dep.) at 183:11-14. [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED] PX4602 at 33:6-14. [REDACTED]
 28 [REDACTED]

1 [REDACTED]
2 [REDACTED] PX4622 at 003.

3 435. Even so, Microsoft has periodically considered making games in the Minecraft
4 franchise completely exclusive to Xbox platforms and to make Minecraft a timed
5 exclusive title on Xbox platforms. For example, Xbox Chief Marketing Officer
6 Mike Nichols messaged Microsoft Gaming CEO Phil Spencer “I’m of the mind
7 that [Minecraft] Dungeons ought be Xbox and PC only” to which Mr. Spencer
8 replied “I agree.” PX1898 at 001; PX4694 at 001-002.

9 436. [REDACTED]
10 [REDACTED] PX4768 at 001. [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED] PX4768 at 001. [REDACTED]
14 [REDACTED]
15 [REDACTED] PX4768 at 001.

16 437. An internal Microsoft email from Phil Spencer shows that Microsoft did not allow
17 Mojang to add Minecraft to Sony’s PlayStation Now subscription service
18 (predecessor to PlayStation Plus Extra and PlayStationPlus Premium) because “we
19 [Microsoft] do see PSNOW as competition to [Xbox Game Pass]” and Microsoft
20 did not want PlayStation Now to “compete more effectively with [Xbox Game
21 Pass].” PX1897 at 001.

22 438. Microsoft has not optimized Minecraft to be played on the PlayStation 5. PX7058
23 (Svensson (Sony) Dep.) at 245:12-246:17. Instead, PlayStation 5 gamers play a
24 backwards-compatible PlayStation 4 version of Minecraft. This PlayStation 4
25 version of Minecraft does not take advantage of all of the PlayStation 5’s
26 Generation 9 technical capabilities, such as ray tracing. PX7058 (Svensson (Sony)
27 Dep.) at 245:12-246:17. Meanwhile, Microsoft has optimized Minecraft for
28 Microsoft’s own Generation 9 consoles—the Xbox Series X|S. PX7058 (Svensson

(Sony) Dep.) at 245:12-246:17.

5. Current First Party Games

439. Almost all of Microsoft's first-party games are exclusive. PX7011 (Spencer (Microsoft) IH (Vol. I)) at 360:2-13.

440. Microsoft's past and current first-party console franchises with significant online multi-player functionality including *Halo* and *Gears of War* are exclusive on Xbox consoles or PC only. See PX7011, Spencer (Microsoft) IH at 332:17-20, 362:14-20; PX5000-195 (Lee Report). If there are significant benefits to supporting multiple platforms for multiplayer franchises like *Call of Duty*, Microsoft would be expected to treat its new franchise similarly to its existing first-party multi-player franchises.

D. The Proposed Acquisition is Likely to Harm Competition

1. The Proposed Acquisition is Likely to Result in Competitive Harm in the Market for High-Performance Consoles and Video Game Consoles.

441. Activision would likely continue to release console titles on multiple high-performance consoles, absent the Proposed Transaction. PX5000-224 (Lee Report).

442. All non-Call of Duty Activision console games released since 2020 are available on Xbox and PlayStation consoles. PX5000-224 (Lee Report) (citing Microsoft Megapivot data).

443. Activision has represented that it plans to release all current planned or under-development console titles on both PlayStation 5 and Xbox Series X|S consoles -- including forthcoming titles in the *Diablo*, *Crash*, *Call of Duty*, and *Tony Hawk's* franchises -- as well as a title in a new franchise. PX0060-014 (Activision Responses and Objections to Complaint Counsel's First Set of Interrogatories).

444. All *Call of Duty* titles released since the introduction of Microsoft and Sony's Generation 8 consoles in 2013 have been available on both Xbox and PlayStation consoles. PX5000-224 (Lee Report) (citing Microsoft Megapivot data).

1 445. Microsoft has indicated that Call of Duty “will likely remain” available on PlayStation
2 consoles and Xbox consoles, without the Proposed Transaction. PX4476-008
3 (Microsoft).

4 446. Foreclosure of Activision content from Sony PlayStation consoles would lead to lower-
5 quality products and reduced consumer choice in the High-Performance Video Game
6 Consoles market relative to the but-for world described above. PX5000-230 (Lee
7 Report).

8 447. Withholding or degrading Activision content would lead to a less attractive game catalog
9 on PlayStation consoles and eliminate options for devices that consumers could use to
10 play the foreclosed games. PX5000-230 (Lee Report).

11 448. Any foreclosed PlayStation consumer who does not already own an Xbox would need to
12 incur the cost of purchasing an Xbox console to continue playing Activision content on a
13 high-performance video game console. PX5000-230 (Lee Report).

14 449. Microsoft acknowledged the potential harm to consumers that can occur from exclusivity
15 (and benefits to consumers from making content more widely available). PX4476-008
16 (Microsoft) [REDACTED]

17 [REDACTED]
18 450. [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED] PX4629-001 (Microsoft).

23 451. Microsoft choosing to foreclose its rivals in the Console Markets by withholding or
24 degrading Activision content would also effectively “punish” gamers on other consoles
25 and tend to harm competition in these markets. PX5000-230 (Lee Report).

26 452. Microsoft’s actions following the ZeniMax acquisition inform the likelihood of harm
27 arising from the Proposed Transaction. As noted above, prior to the ZeniMax
28 acquisition, *Starfield* and *Redfall* were expected to be on Sony PlayStation. PX7042

(Lawver (Microsoft) Dep. Tr. at 348:19-349:3, 360:13-20. By deciding to take certain ZeniMax titles, including *Starfield* and *Redfall*, exclusive following the acquisition, Microsoft has reduced the quality of the portfolio of games available to play on PlayStation relative to the scenario where those titles were available on PlayStation. PX7049 (Hines (Microsoft) Dep.) at 149:15-150:12; PX1080-001 [REDACTED]

453. Microsoft's own distribution decisions with its past and current first-party console franchises with significant online multi-player functionality, including *Halo* and *Gears of War*, reveal its understanding of the value of keeping its titles exclusive on Xbox consoles or PC only, and the likelihood of harm arising from the Proposed Transaction. PX5000-195–96 (Lee Report); PX7011 (Spencer (Microsoft) IH) at 332:17-20.

2. The Proposed Acquisition is Likely to Result in Competitive Harm in Content Subscription Services and Cloud Gaming Services

454. An independent Activision would likely be willing to support non-Microsoft subscription services. For example, a March 2020 Activision slide presentation regarding a [REDACTED] [REDACTED] [REDACTED] PX2419 at 004.

455. Activision has a general goal of platform agnosticism. CEO Bobby Kotick testified that Activision's "goal is to get our games out to as many people on as many devices as possible" and that factors that determine whether an Activision game is available on a subscription service include reaching agreeable commercial terms, sufficient technical capabilities, and confidence that the platform will be successful. PX7006 (Kotick (Activision) IH) at 135:13–138:25.

456. Activision CEO Bobby Kotick testified that "the principal reasons [for not offering Activision games on Game Pass] have been commercial," and if Microsoft offered

1 Activision attractive commercial terms to offer their games on Game Pass, “it’s possible”
2 that Activision would offer their games on Game Pass. PX7006 (Kotick (Activision) IH)
3 at 204:13–205:10.

4 457. Speaking directly about a potential cloud gaming services arrangement with Nvidia,
5 Activision CEO Bobby Kotick testified: “The way I would interpret this is that if
6 NVIDIA agreed to all the commercial terms that are outlined here ... I think these are
7 sort of principles of what a commercial arrangement might look like that would be
8 adequate to get us to support their service.” PX7006 (Kotick (Activision) IH) at 169:7-
9 25.

10 458. Activision content had been available on Sony’s and Nvidia’s subscription services
11 before. PX2189 at 015. For example, Activision titles were available on Nvidia’s
12 GeForce Now between June 2017 and February 2020, including multiple *Call of Duty*
13 titles. PX8000 (Eisler (Nvidia) declaration) at 008–009.

14 459. [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 460. Activision and Microsoft have identified large financial benefits from bringing Activision
18 content to Game Pass. A 2019 email from Activision CFO Armin Zerza to Activision
19 CEO Bobby Kotick regarding [REDACTED]
20 [REDACTED]
21 [REDACTED] PX2138 at 001.

22 461. Activision also recognized significant financial benefits from putting its content onto
23 cloud gaming services. When evaluating a potential [REDACTED]
24 [REDACTED]
25 [REDACTED] PX2419 at 004.

26 462. Microsoft analyses reinforce that there were substantial benefits to the merged firm from
27 adding Activision content to Game Pass. In a January 16, 2022, presentation to
28 Microsoft’s Board of Directors, Microsoft indicated that adding Activision content to

Xbox Game Pass would generate [REDACTED] in “Total Value” to the Merged Entity, including [REDACTED]. PX1763 at 013.

463. In fact, Activision had not ruled out offering its titles on content or cloud subscription services, including those offered by Microsoft, Sony, Nintendo, and Nvidia, and its executives testified that Activision would evaluate commercial terms offered for a subscription opportunity. PX7035 (Kotick (Activision) Dep.) at 130:23-133:20; PX7052 (Zerza (Activision) Dep.) at 42:2-11, 154:13-155:9. With respect to Microsoft’s Game Pass, in particular, Activision was open to adding its content to the content subscription service if they could receive “material value” for it and that “[i]t all depends on what MSFT is willing to offer.” PX2396 at 001; PX2406 at 001.

464. [REDACTED]

[REDACTED] PX2006 at 001.

465. Several of the other major AAA publishers have added their content to Game Pass, including Ubisoft, Take-Two, and Electronic Arts. PX7011 (Spencer (Microsoft) IH Vol I) at 262:23-263:3; PX4624 at 001; PX4625 at 001, 004-005.

466. The foreclosure of Activision content from Microsoft’s rivals would likely increase those rivals’ costs of acquiring content for their cloud and content subscription services.

Microsoft internal documents show that content subscription services—like Game Pass—need to achieve sufficient scale to compete effectively. PX1049 at 003. Microsoft internal documents [REDACTED]

[REDACTED]. PX1877 at 001.

1 467. The result of foreclosure is to make it more difficult for rival content subscription
 2 services and cloud gaming services providers to expand the content available on their
 3 products. [REDACTED]

4 [REDACTED]
 5 [REDACTED] PX1613 at 005.

6 468. Cloud gaming services require substantial infrastructure and investment. Xbox Cloud
 7 Gaming has deployed approximately [REDACTED]. PX4154 at 005. [REDACTED]

8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 469. In fact, the discontinuation of Google Stadia shows that even for deep-pocketed
 12 competitors, gaining traction in cloud gaming and/or content subscription services is
 13 difficult without premium content. PX7035 (Kotick (Activision) Dep.) at 154:18-155:5.

14 470. Fewer entrants and competitors with adequate scale protects Microsoft's position as the
 15 leading provider of content subscription services and cloud gaming services. The
 16 dominance of Microsoft's Game Pass and Xbox Cloud Gaming services would likely
 17 result in a softening of competition, reducing the incentive for Microsoft's rivals to invest
 18 and innovate in their products and force gamers to play games on Microsoft's services
 19 even where they prefer alternatives. [REDACTED] PX8000
 20 (Eisler (Nvidia) declaration) at ¶ 63.

21 471. Microsoft would be more likely to increase the prices of its content subscription and
 22 cloud gaming services, understanding that gamers could not play Activision content
 23 elsewhere. PX8000 (Eisler (Nvidia) declaration) at ¶ 63.

24 **3. The Proposed Acquisition is Likely to Harm Innovation**

25 472. The competition between Microsoft's Xbox and Sony's PlayStation has resulted in
 26 significant advances in hardware innovation of their respective consoles. PX8001 (Ryan
 27 (Sony) declaration) at ¶ 13.
 28

1 473. To provide a better gaming experience, Sony invests in new hardware advancements in
2 its consoles. For example, the PlayStation 5 featured a new type of controller with haptic
3 feedback, a technology feature that uses vibrations to correspond with the gameplay.
4 Older rumble feedback technology vibrated controllers at a static frequency. Haptic
5 feedback enables varied and sensitive vibration that can simulate the feeling of driving
6 with a flat tire or the impact of getting punched. PX8001 (Ryan (Sony) declaration) at ¶
7 13.

8 474. Faced with competition from PlayStation, Microsoft also invested in improving the
9 hardware capabilities of its Generation 9 consoles. PX2393 at 002. It doubled the
10 computing power of the previous generation Xbox console—the Xbox One X—and
11 added a solid state drive to the Xbox Series X. PX8001 (Ryan (Sony) declaration) at ¶
12 13. The hardware advances by Microsoft permit it to showcase the latest in Generation 9
13 games. PX7028 (Spencer (Microsoft) Dep.) at 122:17-122:21.

14 475. [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 476. [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 477. Haptic feedback controllers were the result of Sony’s decision to “consult with the most
23 valued and prestigious development partners to get their input in what features our next
24 generation hardware should offer,” including Activision. PX7053 (Ryan (Sony) Dep.) at
25 30:5-31:15.

26 478. Sony is less likely to share confidential, technical information if Microsoft acquires
27 Activision because it “could not run the risk of a company that was owned by a direct
28 competitor having access” to information “that could leak into other parts of Microsoft

1 and potentially allow them to be able to develop similar features to the ones that [Sony]
2 invented.” PX7053 (Ryan (Sony) Dep.) at 34:13-24.

3 479. [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 480. The loss of Activision content may also dampen innovation in the multi-game content
7 subscription gaming market. Microsoft’s dominant position in multi-game content
8 subscription services is likely to be further strengthened by the exclusivity of Activision’s
9 content. PX0003 at 018 (MSFT Second Request Response); PX5000 at 141.

10 481. [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 482. The foreclosure of Activision content is also likely to impact the nascent market of cloud
17 gaming services. Nvidia GeForce NOW presents an alternative bring-your-own-game
18 (“BYOB”) model that competes against Microsoft’s subscription-based Xbox Cloud
19 Gaming. PX8000 (Eisler (Nvidia) declaration) at ¶ 28.

20 483. Nvidia invested significantly to improve its cloud gaming service to the benefit of
21 gamers, including making resolution upscaling available (reducing image blurring while
22 streaming), reducing the latency of the cloud gaming service, and rolling out touch screen
23 controls to games. PX8000 (Eisler (Nvidia) declaration) at ¶¶ 20-22.

24 484. [REDACTED]

25 [REDACTED]
26 [REDACTED]
27 485. [REDACTED]
28 [REDACTED]

E. Respondents Cannot Rebut Complaint Counsel’s Prima Facie Case Showing the Proposed Acquisition Would Result in Competitive Harm

1. Respondents Cannot Demonstrate that Entry or Expansion would be Timely, Likely, or Sufficient to Prevent Harm from the Proposed Acquisition

a) Entry into Consoles Markets is Unlikely to be Timely, Likely, or Sufficient to Reverse the Likely Harm of the Proposed Transaction.

486. Meaningful entry into the Consoles Markets is uncommon. Prior to the Xbox console’s launch, formerly prominent video game console manufacturers Atari and Sega exited the industry. PX9347 at 001; PX9346 at 008.

487. Microsoft represented that “following the launch of the first Xbox console in 2001, Microsoft has been one of the three main global console providers,” which are Microsoft, Sony, and Nintendo. PX0006 at 012.

488. [REDACTED]

489. Entry is expensive. Microsoft has represented that “[g]aming consoles are generally costly to develop. ... [T]he cost to develop and produce a gaming console continues to increase. Because consoles can be costly to develop, economies of scale are relevant to the extent that average costs will decrease as more units are manufactured and sold.” PX0003 at 070. Microsoft also details various regulations that consoles must comply with to be sold in the United States. PX0003 at 071.

490. To be successful, consoles must offer an attractive catalog of content to attract consumers and generate sales. PX1065 at 015, 017. Due to porting and development costs,

1 publishers are more likely to support consoles with an established user base and larger
 2 installed base. PX5000 (Lee Report) at 049, ¶ 89, Figure 5.

3 491. It is unlikely that entrant console manufacturers will be able to replace Activision content
 4 in their prospective video game catalogs if they are foreclosed. The “Big 4” publishers
 5 have accounted for the majority of game sales on Xbox and PlayStation consoles in
 6 almost every year since 2013. PX5000 (Lee Report) at 049, ¶ 89, Figure 5.

7 492. Few publishers have the resources to consistently produce “AAA” titles. PX4671 at 001;
 8 PX4673 at 002; PX8001 (Ryan (Sony) declaration) at 008.

9 493. Phil Eisler, Vice President and General Manager of Nvidia GeForce Now, declared that
 10 “[t]oday’s AAA video games ... require tens of millions of dollars (in some cases over
 11 \$100 million) and years to produce.” PX8000 (Eisler (Nvidia) declaration) at 006.

12 494. [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED] PX4271 at tab “Sheet1.” [REDACTED]
 19 [REDACTED]
 20 PX1979 at 003.

21 **b) Entry or Expansion into the Broader Content and Cloud Services**
 22 **Market, and the Content Library Services Market and Cloud Gaming**
 23 **Services Market—is Unlikely to be Timely, Likely, or Sufficient to**
 24 **Reverse the Likely Harm of the Proposed Transaction**

25 495. Entry and success in content library and cloud gaming services is challenging. Other
 26 subscription services available today significantly lag the scale of Xbox Game Pass.
 27 PX5000 (Lee Report) at 141. The recent discontinuation of Google Stadia provides
 28 additional evidence that entry into cloud streaming services is challenging, even for well-

1 financed companies like Google and Amazon. PX7035 (Kotick (Activision) Dep.) at
2 154:18-155:5; PX8003 (Zimring (Google) declaration) at ¶ 2; PX3206 at 001 [REDACTED]
3 [REDACTED]
4 [REDACTED]

5 496. Cloud gaming services, in particular, require substantial infrastructure. As of October
6 2022, Xbox Cloud Gaming had deployed approximately [REDACTED] PX4154
7 at 005.

8 497. [REDACTED]
9 [REDACTED] PX1039 at 002.

10 498. Nvidia's Vice President and General Manager of GeForce Now, Phil Eisler, testified that
11 [REDACTED]
12 [REDACTED]

13 499. There are significant economies of scale in subscription services. In particular, the cost of
14 securing content declines with scale, which gives established incumbents a significant
15 advantage over potential entrants or less established competitors. PX0003 at 139–140.
16 Moreover, the cost of content for entrants increases as incumbents lock in limited
17 available content. PX1979 at 003.

18 500. Subscriber scale is also an important determinant of the cost and profitability of investing
19 in new content in that it allows the service to spread investments in content over a larger
20 subscriber base. There are several advantages of subscriber scale “[b]eyond the financial
21 health that typically extends from business growth.” PX1065 at 014.

22 501. Indeed, Microsoft finds “[s]ubscriber scale is the imperative for a successful subscription
23 service” and “is essential in building a subscription service.” PX1065 at 014.

24 502. Microsoft executives note a “virtuous relationship” between content and subscriber scale:
25 [REDACTED]
26 [REDACTED] PX1065
27 at 014.
28

503. As noted above for the Consoles Markets, it is unlikely that entrants into the subscription services market will be able to replace Activision content in their prospective video game catalogs if they are foreclosed.

2. Defendants Cannot Show Efficiencies or Procompetitive Benefits that Negate Competitive Harm

504. Microsoft claims four principal efficiencies or pro-competitive benefits that will result from the Proposed Transaction: (1) making *Call of Duty* titles available on Nintendo; (2) “plans to make Activision content available in Game Pass”; (3) bringing Activision titles to its own cloud gaming service as well as competing services; and (4) “allow[ing] Microsoft to expand into mobile gaming.” Microsoft’s First Interrogatory Responses at 8–10. None of these claimed pro-competitive benefits constitutes a verifiable, merger-specific efficiency.

505. Microsoft’s claim that it will bring “native and console versions of *Call of Duty* titles to Nintendo consoles” for the next 10 years is not a merger-specific efficiency. Microsoft’s First Interrogatory Responses at 8.

506. [REDACTED]

507. Similarly, Microsoft’s claim that it “plans to make Activision content available in Game Pass,” Microsoft’s First Interrogatory Responses at 9, is neither verifiable nor merger-

specific. Microsoft's Matt Booty expressed skepticism after the announcement of the Proposed Transaction about bringing *Call of Duty* to Game Pass, calling the proposal "a big acid test with implications either way." PX4894 at 001.

508. Even assuming that Microsoft does put Activision titles into Game Pass, the claimed pro-competitive benefit is not merger-specific because Microsoft and Activision could achieve the same result through contract. Although Microsoft claims that Activision content "will remain" unavailable on subscription services "absent the acquisition," Microsoft's First Interrogatory Responses at 9, the evidence shows that an independent Activision would likely agree to make its content available on subscription services, including as day-and-date releases, if it received adequate commercial terms.

509. Activision's CEO Bobby Kotick testified that the "principal" reason that the latest Activision content is not currently on subscription services is "commercial" in nature and acknowledged that is "possible" that Activision would offer its content on Xbox Game Pass if "Microsoft offered Activision attractive commercial terms." PX7006 (Kotick (Activision) IH at 204:24-205:4, 204:13-18. Mr. Kotick further testified that Activision's goal as an independent company is to expand its audience to reach as many players as possible. PX7035 (Kotick (Activision) Depo.) at 74:3-9.

510. Indeed, Activision executive Chris Schnakenberg testified that Activision [REDACTED] [REDACTED] [REDACTED] PX7008 (Schnakenberg (Activision) IH) at 174:21-175:15. [REDACTED] [REDACTED] PX2115 at 009.

511. Activision's actions are consistent with predicted economic incentives for independent third-party publishers, who generally stand to realize greater rewards from supporting multiple content library and cloud gaming services than do console manufacturers offering their own subscription services. PX5000 at 163-65.

512. For the same reason, the agreements that Microsoft reached during the pendency of regulatory review of the Proposed Transaction to bring Activision content to cloud gaming services, discussed further *infra* in § IV.F, are not merger-specific efficiencies.

513. Finally, Microsoft's highly speculative plan to expand into mobile gaming is not a verifiable efficiency. Microsoft claims that, with control of Activision's mobile gaming user base, it "intends to scale the Xbox Store to create a new mobile game distribution platform" to rival incumbent app stores from Apple and Google. First Interrogatory Responses at 10.

514. Microsoft has not provided details by which to verify claimed efficiencies in mobile gaming. David Hampton, the Microsoft executive who prepared strategic documents related to the Proposed Acquisition, admitted in testimony that he did not know if anyone had reviewed Activision's mobile capabilities prior to the acquisition. PX7027 (Hampton (Microsoft) Corp. Dep.) at 8:18-10:2. [REDACTED]

[REDACTED] PX7026 (Hampton (Microsoft) Corp. Depo.) at 173:22-175:8.

F. Microsoft's Recently Executed or Proposed Agreements Fail to Replace the Competitive Intensity Likely to Be Lost from the Proposed Acquisition

Agreement with Nintendo

515. On December 7, 2022, the day before the Commission voted to challenge the Proposed Transaction in this Court, Microsoft signed a letter of intent purporting to bring certain to-be-developed *Call of Duty* games to Nintendo. PX4578; RX1212.

516. [REDACTED]

517. In November 2022, Microsoft's Phil Spencer and Sarah Bond decided to initiate negotiations with Nintendo regarding *Call of Duty* because those negotiations "became a priority." PX7057 (Wright (Microsoft) Corp. Dep.) at 7:8-8:22.

518. Nintendo's agreement required a joint public statement and allowed disclosure to the U.S. Federal Trade Commission, the European Commission, and the UK Competition and Markets Authority (and other antitrust regulators as part of the regulatory approval process). PX4578 at 005 (Nintendo Side Letter); RX1212 at 005.

519. [REDACTED]

[REDACTED]

[REDACTED]

520. [REDACTED]

[REDACTED] PX7057 (Wright (Microsoft) Corp. Dep.) at 20:15-21:2.

521. [REDACTED]

[REDACTED] PX7057 (Wright (Microsoft) Corp Dep.) 21:15-22:9. It is unclear

whether *Call of Duty* can even be successfully ported to Nintendo. PX2093 at 005

(Activision), Nintendo Executive Brief (Feb. 3, 2021) ("[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]").

522. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

523. Microsoft claimed privilege on whether any financial analysis was performed regarding the impact of the agreement with Nintendo. PX7057 (Wright (Microsoft) Corp Dep.) at 28:25-29:20.

524. Phil Spencer claimed privilege over the economic effects of entering into the agreement with Nintendo. PX7028 (Spencer (Microsoft) Dep.) at 178–82.

525. Matt Booty refused to answer whether Microsoft had analyzed the benefits and costs of bringing the *Call of Duty* game to the Nintendo Switch. PX7048 (Booty (Microsoft Dep.) at 174:9-174:25.

526. Tim Stuart, the CFO of Xbox, claimed privilege over internal documents and testimony discussing the financial value, financial impact, and profitability of the agreements with Nintendo and Nvidia. PX7040 (Stuart (Microsoft) Dep.) at 379:10-383:8; 385:23-387:11; 387:12-388:16; 377:13-379:9.

527. Microsoft claimed privilege over internal documents related to the Side Letter with Nintendo. PX0070 at 004 (Microsoft Responses & Objections to Complaint Counsel's Request for Admissions).

Agreement with Nvidia and Foreign Cloud Gaming Companies

528. On February 20, 2023, the day before Microsoft appeared before the European Commission at a hearing on the Proposed Transaction, Microsoft signed an agreement purporting to bring Activision games to Nvidia. RX1211; PX1784 (Windows Addendum Nvidia Agreement).

529. [REDACTED]

530. [REDACTED] PX7055 (Wright (Microsoft) Dep.) at 102:22 – 103:17-25.

531. [REDACTED] . PX7055 (Wright (Microsoft) Dep.) at 126:5-23.

532. [REDACTED] PX7055 (Wright (Microsoft) Dep.) at 97:10-98:10.

533. Matt Booty claimed privilege and refused to answer whether Microsoft had analyzed the benefits and costs of bringing Xbox Game studios to Nvidia GeForce Now. PX7048 (Booty (Microsoft) Dep.) at 172:11-173:3.

534. Microsoft claimed privilege over internal documents related to the Nvidia agreement. PX0070 at 004 (Microsoft Responses & Objections to Complaint Counsel's Request for Admissions).

535. In order for Nvidia to be able to allow access to Game Pass on GeForce Now under their agreement with Microsoft, [REDACTED]

536. [REDACTED]

537. [REDACTED]. PX7057 (Wright (Microsoft) Corp Dep.) at 49:2-52:25.

538. Microsoft did not perform any financial analysis of the Nvidia, Boosteroid, or Ubitus Agreements. PX7055 (Wright (Microsoft) Dep.) at 94:4-95:5, 133:10-134:16, 135:10-19, 160:12-21, 161:8-22; 177:7-16.

539. [REDACTED] PX7055 (Wright (Microsoft) Dep.) at 198:16-22, 200:3-8; PX7057 (Wright (Microsoft) Corp Dep.) at 45:25-46:4.

540. [REDACTED] PX7057 (Wright (Microsoft) Corp Dep.) at 27:6-28:7, 42:10-43:21.

546.

[REDACTED]

547.

[REDACTED]

548.

[REDACTED]

549.

[REDACTED]

V. PROPOSED CONCLUSIONS OF LAW

1. Section 7 of the Clayton Act prohibits mergers when “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18.
2. Section 5 of the FTC Act proscribes “[u]nfair methods of competition in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. § 45(a)(1).
3. An acquisition that violates Section 7 of the Clayton Act, by definition, is a violation of Section 5 of the FTC Act. *See, e.g., FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986).
4. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Federal Trade Commission, whenever it has reason to believe that a proposed merger is unlawful, to seek preliminary injunctive relief to prevent consummation of a merger until the Commission has the opportunity to adjudicate the merger’s legality in an administrative proceeding.
5. Specifically, Section 13(b) “allows a district court to grant the Commission a preliminary injunction ‘[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.’” *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (quoting 15 U.S.C. § 53(b)).
6. The purpose of a § 13(b) proceeding “is not ‘to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.’” *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 67 (D.D.C. 2009) (quoting *FTC v. Whole Foods Mkt. Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (Tatel, J., concurring); *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) (“Our present task is not to make a final determination on whether the proposed merger violates Section 7, but rather to make only a preliminary assessment of the merger’s impact on competition.”)).
7. Preliminary injunctions under § 13(b) “are meant to be readily available to preserve the status quo while the FTC develops its ultimate case.” *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327,

352 (3d Cir. 2016) (“The purpose of Section 13(b) is to preserve the status quo and allow the FTC to adjudicate the anticompetitive effects of the proposed merger in the first instance.”); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976) (“The only purpose of a proceeding under § 13 is to preserve the status quo until FTC can perform its function.”).

8. “[A]t this preliminary phase [the FTC] just has to raise substantial doubts about a transaction.” *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008); *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1164 (9th Cir. 1984) (“‘serious, substantial, difficult’ questions”). As to market definition, for example, the FTC’s burden is simply to “rais[e] some question of whether [a market] is [] well-defined.” *FTC v. Whole Foods Mkt. Inc.*, 548 F.3d 1028, 1037 (D.C. Cir. 2008). The FTC’s burden is met by a “tenable showing,” even if there is also “conflicting evidence on the relevant product market” or “market shares.” *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984).

9. Likelihood of ultimate success is not determined by a “statistical calculation of the parties’ odds” of winning on the merits. *Fed. Trade Comm’n v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2022 WL 16637996, at *5 (N.D. Cal. Nov. 2, 2022). Although the district court in *Meta Platforms* explained that a court is “charged with exercising their ‘independent judgment’ and evaluating the FTC’s case and evidence on the merits,” the court clarified with, “[i]n summary, the Court considers Section 13(b)’s ‘likelihood of ultimate success’ inquiry ... mean[s] the likelihood of the FTC’s success on the merits in the underlying administrative proceedings, as opposed to success following a Commission hearing, the development of an administrative record, and appeal before an unspecified Court of Appeals.” *F.T.C. v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2022 WL 16637996, at *5–6 (N.D. Cal. Nov. 2, 2022) (citing *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1090–91 (S.D.N.Y. 1977) (“[W]hile the statute requires us to consider the FTC’s likelihood of ultimate success and to exercise our independent judgment in that regard, it appears that it does not require the FTC to prove, or us to find, probable success on the merits but something less.”)).

10. To carry their responsive burden on likelihood of success, Defendants must dispel any and all doubts about the legality of their transaction, such that the court would be “certain[.]” and have “no doubt that [the] merger would not substantially lessen competition.” *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008).
11. Even as to the ultimate merits, and all the more so at the preliminary injunction stage under Section 13(b), “any ‘doubts are to be resolved against the transaction.’” *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3rd Cir. 2016) (quoting *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) (Posner, J.)).
12. If there are adequate questions or doubts about the transaction’s legality, § 13(b) temporary relief is warranted—even if ultimately “post-hearing, the FTC may accept the rebuttal arguments proffered by the [defendants].” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 725 (D.D.C. 2001).
13. The statute “places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard.” *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984); *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1096 (S.D.N.Y. 1977) (“The equities to be weighed here are not the usual equities of private litigation but public equities.”).
14. “Under this more lenient standard, ‘a court must 1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities.’” *FTC v. Affordable Media*, 179 F.3d 1228, 1233 (9th Cir. 1999) (quoting *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984)).
15. And “[w]hen the [FTC] demonstrates a likelihood of ultimate success, a counter showing of private equities alone would not suffice to justify denial of a preliminary injunction barring the merger.” *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984) (citing *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981)).
16. In weighing the equities under § 13(b), “public equities receive far greater weight.” *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984). Public equities include “effective enforcement of the antitrust laws” and ensuring the Commission’s ability to

obtain adequate relief if it ultimately prevails on the merits. *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1225 (11th Cir. 1991). “[T]he preservation of competition is always in the public interest.” *United States v. Tribune Publ’g Co.*, No. CV 16-01822-AB, 2016 WL 2989488, at *5 (C.D. Cal. Mar. 18, 2016).

17. Defendants often complain about the “cost that delaying [their proposed] transaction would exact” on them, but courts “must afford such concerns little weight” to avoid undermining “section 13(b)’s purpose of protecting the ‘public-at-large, rather than individual private competitors.’” *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1225 (11th Cir. 1991) (quoting *FTC v. Nat’l Tea Co.*, 603 F.2d 694, 697 n.4 (8th Cir. 1979)).
18. Defendants’ assertion “that a preliminary injunction would force them to abandon” their proposed transaction is a private equity at best, and “private equities alone do not outweigh the Commission’s showing of likelihood of success.” *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984). “[A]lthough the court recognizes the time, resources, and effort that Defendants have put into planning this transaction, the Defendants’ stated intention to abandon the transaction prior to the merits proceeding is a private equity and cannot on its own overcome the public equities that favor the FTC.” *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 74 (D.D.C. 2018); *see also FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 882 n.8 (E.D. Mo. 2020).
19. “[A] ‘risk that the transaction will not occur at all,’ by itself, is a private consideration that cannot alone defeat the preliminary injunction.” *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1041 (D.C. Cir. 2008); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1346 (4th Cir. 1976) (holding that such arguments are irrelevant to § 13(b) proceedings); *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 791 (N.D. Ill. 1978) (“That leaves the claimed injury [from the target’s] announced intention of walking away from the acquisition. [But] the equities, and consequently the injuries, to be reckoned in section 13(b) cases are not private ones, but public ones.”); *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 791 (N.D. Ill. 1978) (“[T]his conclusion is particularly appropriate where . . . the alleged private

injury is caused by the parties' own decision to, in effect, cancel the deal in the event that an injunction be issued.").

20. Plaintiff FTC has shown that it is likely to succeed on the merits of its Section 7 challenge in the agency's administrative court, and the equities favor issuing a preliminary injunction.

A. The FTC Is Likely to Succeed on the Merits of Its Section 7 Challenge

21. In the administrative merits proceeding, the FTC's burden will be to prove that the effect of the Acquisition "*may be* substantially to lessen competition, or to tend to create a monopoly" in violation of Section 7 of the Clayton Act. *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984) (emphasis in original) ("It is well established that a section 7 violation is proven upon a showing of reasonable probability of anticompetitive effect").

22. At this preliminary stage, the Ninth Circuit has explained that the government can meet "its burden of demonstrating a likelihood of success by presenting evidence sufficient to raise serious, substantial, difficult questions regarding the anticompetitive effects of the proposed [transaction]." *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1164 (9th Cir. 1984) (cleaned up); *see also* *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) ("[A]t this preliminary phase [the FTC] just has to raise substantial doubts about a transaction. One may have such doubts without knowing exactly what arguments will eventually prevail.").

23. "Because the issue in this action for preliminary relief is a narrow one, [courts] do not resolve the conflicts in the evidence, compare concentration ratios and effects on competition in other cases, or undertake an extensive analysis of the antitrust issues." *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1164 (9th Cir. 1984); *see also* *California v. Am. Stores Co.*, 872 F.2d 837, 841 (9th Cir. 1989) ("At this stage, we do not resolve conflicts in the evidence."), *rev'd on other grounds*, *California v. Am. Stores Co.*, 495 U.S. 271 (1990); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (the FTC "is not

required to *establish* that the proposed merger would in fact violate Section 7” (emphasis in original)); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 67 (D.D.C. 2009) (“the district court’s task is not to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.” (quoting *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (Tatel, J., concurring))); *see also* *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1048 (D.C. Cir. 2008) (Tatel, J., concurring) (“Although courts certainly must evaluate the evidence in section 13(b) proceedings and may safely reject expert testimony they find unsupported, they trench on the FTC’s role when they choose between plausible, well-supported expert studies.”).

24. Rather, this Court’s task is only to “measure the probability that, after an administrative hearing . . . the Commission will succeed in proving that the effect of the [proposed] merger ‘may be substantially to lessen competition, or to tend to create a monopoly’ in violation of section 7.” *FTC v. H.J. Heinz*, 246 F.3d 708, 714 (D.C. Cir. 2001) (quoting 15 U.S.C. § 18).

25. Section 7 analysis “necessarily focuses on ‘probabilities, not certainties.’” *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys. Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015) (quoting *Brown Shoe v. United States*, 370 U.S. 294, 323 (1962)).

26. This entails “‘a prediction of [the merger’s] impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their incipency.’” *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys. Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015) (quoting *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 362 (1963)).

27. At the merits phase, which in this case is the administrative proceeding that begins on August 2, Courts and the Commission have traditionally analyzed Section 7 claims under a burden-shifting framework. *See St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health System, Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015); *Otto Bock HealthCare N. Am., Inc.*, No.

9378, 2019 WL 5957363, at *11 (F.T.C. Nov. 1, 2019); *Polypore Int'l, Inc.*, No. D-9327, 2010 WL 9549988, at *9 (F.T.C. Nov. 5, 2010).

28. The same burden-shifting framework applies to both horizontal and vertical mergers. *See Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *19 (F.T.C. Mar. 31, 2023) (applying the burden-shifting framework to a vertical merger); *see United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019). Section 7 of the Clayton Act applies to all mergers, which “must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate, or other.” *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

29. Here, the Proposed Acquisition is a vertical transaction. “Economic arrangements between companies standing in a supplier-customer relationship are characterized as ‘vertical.’” *Brown Shoe v. United States*, 370 U.S. 294, 323 (1962).

30. At the merits phase, “[f]irst, the government must establish its *prima facie* case by making a ‘fact-specific’ showing that a merger is ‘likely to be anticompetitive.’” *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *19 (F.T.C. Mar. 31, 2023) (quoting *United States v. AT&T*, 916 F.3d 1029, 1032 (D.C. Cir. 2019); *Polypore Int'l*, 2010 WL 9549988, at *9; *see also St. Alphonsus Med. Ctr.-Nampa Inc.*, 778 F.3d at 783; *United States v. Bazaarvoice, Inc.*, No. 13-CV-00133-WHO, 2014 WL 203966, at *64 (N.D. Cal. Jan. 8, 2014).

31. To establish a *prima facie* case at the merits trial, the government’s burden will be to show a “reasonable probability” that the Proposed Acquisition would substantially lessen competition. *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962); *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *19 (F.T.C. Mar. 31, 2023); (“‘reasonable likelihood’ of a substantial lessening of competition” (quoting *Brown Shoe*, 370 U.S. 294, 362 (1962))). In general, “[a] reasonable probability is, of course, less than a certainty, or even a likelihood.” *United States v. Koziol*, 993 F.3d 1160, 1186 (9th Cir. 2021) (quoting *United States v. Joseph*, 716 F.3d 1273, 1280 (9th Cir. 2013) (internal quotation marks omitted)), *cert. denied*, 142 S. Ct. 1372 (2022).

32. The Government’s burden of production at this step will be low. Even at the ultimate merits—and all the more so at the preliminary injunction stage under Section 13(b)—any “doubts are to be resolved against the transaction.” *Otto Bock HealthCare N. Am., Inc.*, 2019 WL 2118886, at *2 (F.T.C. May 6, 2019) (Chappell, A.L.J.) (quoting *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989)).
33. If the Government is able to carry its initial burden, “[t]he burden [will] then shift[] to the defendant to rebut the prima facie case.” *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015).
34. “[I]f the [defendant] successfully rebuts the *prima facie* case, the burden of production [will] shift[] back to the Government and merge[] with the ultimate burden of persuasion, which is incumbent with the Government at all times.” *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015) (quoting *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008)).
35. Here, Plaintiff has more than met its burden of establishing a likelihood of success on the merits under both the *Brown Shoe* and ability and incentive frameworks. *See of Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *33 (F.T.C. Mar. 31, 2023); *infra* Conclusions of Law § V.E.
36. The Government has raised sufficiently serious, substantial, difficult questions to warrant temporary relief under § 13(b). *Infra* Conclusions of Law at § V.E. In fact, the evidence shows that even the eventual merits standard is met: the Proposed Acquisition has a reasonable probability of substantially lessening competition through foreclosure in the markets for High-Performance Consoles, Multi-Game Content Library Subscription Services, and Cloud Gaming Subscription Services (the “Relevant Markets”). *Infra* Conclusions of Law at § V.E.1.
37. The Proposed Acquisition also has a reasonable probability of harming innovation in the Relevant Markets. *Infra* Conclusions of Law § V.E.2. An emerging market like Cloud Gaming Subscription services is particularly susceptible to innovation harm. *Infra* Conclusions of Law § V.E.2.

38. New entry or expansion is unlikely to be sufficient to offset the competitive harm of the Proposed Acquisition. *Infra* Conclusions of Law § V.F.
39. Any proposed efficiencies or alleged procompetitive benefits are unlikely to offset the competitive harm in the Relevant Markets. *Infra* Conclusions of Law § V.G.
40. Indeed, proposed remedies, such as the agreements with third parties offered by Microsoft, are irrelevant to a § 13(b) proceeding. *See FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1345 (4th Cir. 1976) (holding FTC was “entitled to preserve the status quo pending adjudication” regardless of what “ultimate remedy” might eventually be deemed appropriate); *Infra* Conclusions of Law § V.H.
41. Again, “at this preliminary phase [the FTC] just has to raise substantial doubts” about whether a transaction poses a reasonable probability of lessening competition. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008).

B. High-Performance Consoles, Multi-Game Content Library Subscription Services, and Cloud Gaming Subscription Services Are Relevant Markets

42. The Supreme Court has recognized that Section 7 prohibits acquisitions that may “substantially lessen competition within the area of effective competition.” *Brown Shoe v. United States*, 370 U.S. 195, 324 (1962) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957) (internal quotations omitted)).
43. To determine the “area of effective competition,” courts “reference . . . a product market (the ‘line of commerce’) and a geographic market (the ‘section of the country’).” *Brown Shoe v. United States*, 370 U.S. 194, 324 (1962). “Often, the first steps in analyzing a merger’s competitive effects are to define the geographic and product markets affected by it.” *ProMedica Health Sys., Inc. v. F.T.C.*, 749 F.3d 559, 565 (6th Cir. 2014). Whether the transaction at issue is horizontal or vertical, courts use the same set of analytic tools to define the affected market. *See Brown Shoe v. United States*, 370 U.S. 194, 324–28 (1962).
44. It is well-settled that “the boundaries of the relevant market must be drawn with sufficient breadth to . . . recognize competition where, in fact, competition exists.” *Brown Shoe v.*

United States, 370 U.S. 294, 326 (1962); *see also United States v. Kimberly-Clark Corp.*, 264 F. Supp. 439, 452–53 (N.D. Cal. 1967) (citing *Brown Shoe Co.*, 370 U.S. 294, 325) (“[W]ithin a market, ‘well-defined submarkets may exist, which, in themselves, constitute product markets for antitrust purposes.’”).

45. A product market’s “outer boundaries” are determined by the “reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 198 (D.D.C. 2018) (quoting *Brown Shoe v. United States*, 370 U.S. 194, 325 (1962)).

46. Even at the merits stage, “[r]elevant markets need not have precise metes and bounds.” *Pac. Steel Grp. v. Comm. Metals Co.*, No. 20-CV-07683, 600 F. Supp. 3d 1056, 1070 (N.D. Cal. 2022). “[E]ven if alternative submarkets exist . . . or if there are broader markets that might be analyzed, the viability of such additional markets does not render the one identified by the government unusable.” *United States v. Bertelsmann SE & Co.*, No. 21-2886-FYP, 2022 WL 16949715, at *14 (D.D.C. 2022); *see also Newcal Indus., Inc. v. Ikon Office Sol’n*, 513 F.3d 1038, 1045 (9th Cir. 2008).

47. Whether a market can be characterized as “nascent” or “emerging” bears “limited weight” on whether it constitutes a relevant market. *See Fed. Trade Comm’n v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2023 WL 2346238, at *19 (N.D. Cal. Feb. 3, 2023).

48. To determine the validity of a relevant antitrust market definition, courts generally look to two types of evidence: “the ‘practical indicia’ set forth by the Supreme Court in *Brown Shoe* and testimony from experts in the field of economics” regarding the Hypothetical Monopolist Test (“HMT”). *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 27 (D.D.C. 2015).

49. There is “no requirement to use any specific methodology in defining the relevant market.” *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., Ltd.*, 20 F.4th 466, 482 (9th Cir. 2021). As such, courts have determined relevant antitrust markets using, for example, only the *Brown Shoe* factors, or a combination of the *Brown Shoe* factors and the HMT. *See, e.g., Lucas Auto. Eng., Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766–68 (9th Cir. 2001) (relying on *Brown Shoe* factors alone in review of district court’s determination

of relevant market); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 20–21 (D.D.C. 2017) (using HMT and *Brown Shoe* factors to analyze relevant market).

50. In a § 13(b) proceeding, the Government’s burden is only to “rais[e] some question of whether” a market is “well-defined.” *Whole Foods Mkt., Inc.*, 548 F.3d at 1037. Here, under both the *Brown Shoe* practical indicia, *infra* Conclusions of Law § V.B.1, and the HMT, *infra* Conclusions of Law § V.B.2, the relevant markets are High-Performance Consoles, Multi-game Content Library Subscription Services, and Cloud Gaming Subscription Services. Harm is also likely to occur in broader relevant product markets. *infra* Conclusions of Law § V.B.3.

1. The Relevant Markets Satisfy the *Brown Shoe* Practical Indicia

51. In *Brown Shoe*, the Supreme Court identified a series of “practical indicia” courts may consider in determining the relevant product market. The indicia include “industry or public recognition of the [market] as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962); *see also Otto Bock*, 2019 WL 2118886, at *5 (Chappell, A.L.J.); *Sysco* 113 F. Supp. 3d at 27; *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 21 (D.D.C. 2017); *United States v. H&R Block*, 833 F. Supp. 2d 36, 51 (D.D.C. 2011).

52. Relevant markets “can exist even if only some of these [*Brown Shoe*] factors are present.” *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997); *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *33 (F.T.C. Mar. 31, 2023); *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 308-309 (7th Cir. 1976); *see Int’l T. & T. Corp. v. General T. & E. Corp.*, 518 F.2d 913, 932–33 (9th Cir. 1975) (“These indicia were listed with the intention of furnishing practical aids in identifying zones of actual or potential competition rather than with the view that their presence or absence would dispose, in talismanic fashion, of the submarket issue.”)

53. The market for High Performance Consoles satisfies the *Brown Shoe* indicia factors, including industry and public recognition; characteristics and uses; sensitivity to price changes; distinct prices; and distinct customers. *See* Plaintiff’s Pre-trial Findings of Fact (“PPFF”) § II.A.

54. The market for Multi-Game Content Library Subscription Services satisfies the *Brown Shoe* indicia factors, including industry and public recognition; benefits, characteristics and uses; sensitivity to price changes; distinct pricing and marketing; and distinct customers. *See* PPFF § II.C.

55. The market for Cloud Gaming Subscription Services satisfies the *Brown Shoe* indicia factors, including industry and public recognition, characteristics and uses, unique production facilities, distinct pricing and marketing, and distinct customers. *See* PPFF § II.D.

2. The Relevant Markets Satisfy the HMT

56. Courts and the Commission may, alternatively or in addition, use the Hypothetical Monopolist Test to assess the relevant product market. *See FTC v. Advocate Health Care Network*, 841 F.3d 460, 468–69 (7th Cir. 2016) (applying the hypothetical monopolist test to define a relevant geographic market); *see also FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016); *ProMedica Health Sys., Inc.*, 2012 WL 1155392, at *14 (F.T.C. Mar. 28, 2012); *Sysco*, 113 F. Supp. 3d at 33; *H&R Block*, 833 F. Supp. 3d at 51–52; *Horizontal Merger Guidelines* § 4.1.1.

57. Under the HMT, a candidate market constitutes a relevant antitrust market if a hypothetical monopolist could profitably impose a “small but significant and non-transitory increase in price” (“SSNIP”), or a reduction in product quality or service, on at least one product of the merging parties in the candidate market. The candidate market does not satisfy the HMT if customers switching to alternative products would make such a price increase unprofitable. *See Horizontal Merger Guidelines* §§ 4, 4.1.1; *see also Sidibe v. Sutter Health*, No. 12-CV-04854-LB, 2019 WL 2078788, at *4 (N.D. Cal. May

9, 2019); *United States v. Bazaarvoice, Inc.*, No. 13-CV-00133-WHO, 2014 WL 203966, at *28 (N.D. Cal. Jan. 8 2014).

58. The market for High Performance Consoles satisfies the HMT. *See* PPFF § II.A.

59. The market for Multi-Game Content Library Subscription Services satisfies the HMT. *See* PPFF § II.C.

60. The market for Cloud Gaming Subscription Services satisfies the HMT. *See* PPFF § II.D.

3. Harm is Also Likely to Occur in Broader Relevant Product Markets

61. “[E]ven if alternative submarkets exist . . . or if there are broader markets that might be analyzed, the viability of such additional markets does not render the one identified by the government unusable.” *United States v. Bertelsmann SE & Co.*, No. 21-2886-FYP, 2022 WL 16949715, at *14 (Nov. 15, 2022 D.D.C. 2022).

62. High-Performance Consoles are a relevant product market for evaluating the likely competitive effects of the Proposed Acquisition. *Supra* Conclusions of Law § V.B.1 & § V.B.2.; *see* PPFF § II.A.

63. The anticompetitive effects of the Proposed Acquisition are also reasonably likely to occur in a broader market for gaming consoles that includes High-Performance Consoles and the highly differentiated Nintendo Switch. *See* PPFF § II.B.

64. Multi-Game Content Library Subscription Services are a relevant product market for evaluating the likely competitive effects of the Proposed Acquisition. *Supra* Conclusions of Law § V.B.1. & § V.B.2.; *see* PPFF § II.C.

65. Cloud Gaming Subscription Services are a relevant product market for evaluating the likely competitive effects of the Proposed Acquisition. *Supra* Conclusions of Law § V.B.1. & § V.B.2.; *see* PPFF § II.D.

66. The anticompetitive effects of the Proposed Acquisition are also likely to occur in any relevant antitrust market that contains Cloud Gaming Subscription Services, including a combined Multi-Game Content Library and Cloud Gaming Subscription Services market. *See* PPFF § II.E.

C. The United States is the Relevant Geographic Market

67. The relevant market in which to assess the anticompetitive harms of the Acquisition necessarily includes the relevant geographic market, or the area of competition affected by the merger. *See Sysco*, 113 F. Supp. 3d at 48 (“[T]he proper question to be asked . . . [is] where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.”) (quoting *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 357 (1963)); *see also Advocate Health Care Network*, 841 F.3d at 476 (citing *Phila. Nat’l Bank*, 374 U.S. at 357) (relevant geographic market is “the place where the ‘effect of the merger on competition will be direct and immediate’”); *see also Horizontal Merger Guidelines* § 4.2.
68. The relevant geographic market is the region in “which consumers can practically turn for alternative sources of the product and in which the antitrust defendant faces competition.” *FTC v. Staples Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997).
69. As the Supreme Court has explained, the relevant geographic market must “correspond to the commercial realities of the industry” as determined by a “pragmatic, factual, approach.” *Brown Shoe v. United States*, 370 U.S. 294, 336 (1962).
70. Here, the United States is the relevant geographic market in which to analyze the effects of the Proposed Acquisition. *See* PPFF § II.F.
71. Under Section 7 of the Clayton Act, 15 U.S.C. § 18, the government need only show a substantial lessening of competition in “any section of the country.” Sales into the United States is a “section of the country.” *See United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 620–21 & n.20 (1974) (finding “section of the country” to be synonymous with “relevant geographical market,” which can be the United States as a whole.)
72. The Clayton Act does not require the government to analyze whether a transaction results in anticompetitive effects in products sold outside the United States. 15 U.S.C. § 18.

D. Activision’s Gaming Content Is a Related Product to the Relevant Markets

73. In vertical transactions, upstream inputs to downstream products in a relevant product market are referred to as “related products.” *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *28 (F.T.C. Mar. 31, 2023).

74. The Government need not prove that the related product constitutes a relevant antitrust market. *See Brown Shoe v. United States*, 370 U.S. 294, 325–26, 344 (1962) (finding a Section 7 violation when only a relevant product market was shown); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593–97, 607 (1957) (same).

75. No court has held that the government must prove monopoly power in a related product market to prove that a merger violates the Clayton Act. Instead, the proper inquiry here is whether Activision supplies related products on which Microsoft’s rivals rely. *See United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (accepting the district court’s finding of a relevant antitrust product market for downstream multichannel video distribution in which alleged harm from transaction would occur, but not requiring definition of an antitrust product market around the related product of upstream programming).

76. Activision’s gaming content is a related product to High-Performance Gaming Consoles, Multi-Game Content Subscription Services, Cloud Gaming Subscription services, and the broader markets discussed above, serving as a substantially important input for the Relevant Markets. *See* PPF § III.

E. The Proposed Acquisition Has a Reasonable Probability of Substantially Lessening Competition in the Relevant Markets

1. Foreclosure of Microsoft’s Rivals in the Relevant Markets

77. As the Supreme Court has explained, “[t]he primary vice of a vertical merger . . . is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a clog on competition, which deprives rivals of a fair opportunity to compete.” *Brown Shoe v. United States*, 370 U.S. 294, 323–24 (1962) (cleaned up).

78. Foreclosure in the vertical merger context can mean either “foreclosing competitors of [one party] from access to a potential source of supply, or from access on competitive terms.” *Yankees Entm’t & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 673 (S.D.N.Y. 2002); *see also Sprint Nextel Corp. v. AT&T, Inc.*, 821 F. Supp. 2d 308, 330 (D.D.C. 2011) (explaining rivals “paying more to procure necessary inputs” is the type of injury “that the antitrust laws were designed to prevent”).
79. Importantly, the Clayton Act does not require that there be complete foreclosure to run afoul of antitrust laws. *See Brown Shoe v. United States*, 370 U.S. 294, 323 n.39 (1962) (citing S. Rep. No. 81-1775, at 4298 (1950)) (explaining that the goal of Section 7 is “to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act.”); *Brown Shoe v. United States*, 370 U.S. 294, 328–29 (1962) (“[T]he tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act.”).
80. “Such foreclosure may be achieved by increasing prices, withholding or degrading access, reducing service or support, or otherwise increasing the costs or reducing the efficiency or efficacy” of rival products. *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *32 (F.T.C. Mar. 31, 2023); *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 605 (1957) (finding vertical foreclosure in violation of § 7 although competitors “did obtain higher percentages of the General Motors business in later years”).
81. “Case law provides two different . . . standards for evaluating the likely effect of a vertical transaction.” *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *32 (F.T.C. Mar. 31, 2023). These are referred to as the *Brown Shoe* multifactor analysis and the ability and incentive analysis. *Brown Shoe v. United States*, 370 U.S. 294, 328–29 (1962); *see United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (examining the district court’s analysis under an ability and incentive framework).
82. The Supreme Court in *Brown Shoe* set forth a multifactor analysis for assessing liability in the context of vertical mergers. *Brown Shoe v. United States*, 370 U.S. 294, 328–34

(1962). These factors include: “the size of the share of the market foreclosed,” “the very nature and purpose of the arrangement,” “the trend toward concentration in the industry,” and entry barriers, among others. *Brown Shoe v. United States*, 370 U.S. 294, 328–34 (1962); *Ford Motor Co. v. United States*, 405 U.S. 562, 566–70 (1972); *see also Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *33 (F.T.C. Mar. 31, 2023).

83. The multifactor analysis of *Brown Shoe* and progeny is not a “precise formula[],” and not every factor must be present or even considered to support a finding of liability. *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *32 (F.T.C. Mar. 31, 2023) (finding liability when four *Brown Shoe* liability factors were met). In *Ford Motor*, for example, the Supreme Court affirmed that a vertical merger was illegal after considering “the effect of raising barriers to entry,” “the number of competitors in the . . . industry,” and the amount of foreclosure.) *Ford Motor Co. v. United States*, 405 U.S. 562, 566–70 (1972).

84. The ability and incentive analysis focuses “on whether a transaction is likely to increase the ability and/or incentive of the merged firm to foreclose rivals.” *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *33 (F.T.C. Mar. 31, 2023); *Union Carbide Corp.*, 59 F.T.C. 614, 1961 WL 65409, at *34–35 (1961) (finding anticompetitive harm where the merged firm has the power to exclude competing producers from a segment of the market).

85. While “it is the power [to harm competitors] that counts, not its exercise,” *Union Carbide Corp.*, 59 F.T.C. 614, 1961 WL 65409, at *19 (1961) (Lipscomb, A.L.J.), courts may examine a merged firm’s incentives to foreclose the relevant market when considering whether there is the potential for competitive harm. *See, e.g., Ford Motor Co. v. United States*, 405 U.S. 562, 571 (1972) (Because Ford “made the acquisition in order to obtain a foothold” in the aftermarket spark plug market, “it would have every incentive to . . . maintain the virtually insurmountable barriers to entry” in that market through foreclosure.); *see also United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (examining the district court’s analysis under an ability and incentive framework).

1 86. Satisfying both the *Brown Shoe* and ability and incentive standards is not required to find
2 liability. *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *33 (F.T.C. Mar.
3 31, 2023).

4 87. But here, Plaintiff has satisfied its burden as required for a §13(b) preliminary injunction
5 and has shown a likelihood of success in the administrative proceeding under both *Brown*
6 *Shoe* and ability and incentive standards. *Infra* Conclusions of Law at § E.E.1.

7 88. Plaintiff has established *Brown Shoe* functional liability factors sufficient to warrant
8 temporary § 13(b) relief. *See* PPFF § IV.

9 89. The Proposed Acquisition’s “very nature and purpose” is anticompetitive. *Brown Shoe v.*
10 *United States*, 370 U.S. 294, 329–30 (1962). The Proposed Acquisition’s purpose is to
11 transform an independent source of supply into a captive one controlled exclusively by
12 Microsoft. *See* PPFF §§ IV.A. & IV.B. The nature and purpose of the Proposed
13 Acquisition is also anticompetitive because the Proposed Acquisition is a response to
14 other vertical mergers and furthers the vertical consolidation of the industry. *United States*
15 *v. Sybron Corp.*, 329 F. Supp. 919, 929 (E.D. Pa. 1971), *see* PPFF § I.E.1., and because
16 the acquirer’s past conduct following similar transactions demonstrates its likely
17 anticompetitive nature. *See* PPFF §§ I.H., IV.C.

18 90. Here, there is also a “trend toward concentration in the industry.” *Brown Shoe v. United*
19 *States*, 370 U.S. 294, 332–33 (1962); *see also Warner Commc’ns Inc.*, 742 F.2d at 1162–
20 63 (listing “industry trends toward concentration, the degree of concentration within the
21 industry, [and] prior mergers by the firms in question” among “[f]actors to consider when
22 determining the impact on competition”).” *See* PPFF § I.E.1.

23 91. The Proposed Acquisition would also increase entry barriers in the Relevant Markets. *See*
24 *Ford Motor*, 405 U.S. at 568–72 (explaining that, after Ford made its vertical acquisition,
25 “it would have every incentive to . . . maintain the virtually insurmountable barriers to
26 entry to the aftermarket”) (citing *Brown Shoe v. United States*, 370 U.S. 294, 323–24
27 (1962)). *See* PPFF §§ I.E–G., III., IV.B.

92. Courts have held that the creation or increase of entry barriers can militate in favor of prohibiting a vertical merger. *See U.S. Steel*, 426 F.2d at 605; *Ford Motor*, 405 U.S. at 568–71. As the Sixth Circuit explained in *U.S. Steel Corp. v. FTC*, such barriers can include “possible reliance on suppliers from a vertically integrated firm with whom [a new entrant in the relevant market] is also competing” and “the psychological ‘fears’ of smaller rivals competing with large integrated concerns.” 426 F.2d at 605 (citing *Procter & Gamble*, 386 U.S. at 578).

93. Microsoft has the ability and incentive to use control of Activision content to weaken its rivals in the Relevant Markets. *See* PPFF §§ IV.A.–D.

94. The Government will be able to carry its burden in the merits proceeding without specifying the precise actions Microsoft would take to weaken its rivals in the Relevant Markets. *E.g., United States v. Sybron Corp.*, 329 F. Supp. 919, 928–29 (E.D. Pa. 1971) (observing that even if “absolute foreclosure” would be unlikely, “there are many more subtle avenues available”).

95. Microsoft has the ability to control access to Activision content in many ways. PPFF § IV. A.

96. The evidence demonstrates Microsoft has incentive to foreclose its rivals, including its past behavior after its acquisition of ZeniMax. *See* PPFF §§ IV.B., IV.C.

97. Plaintiff has also established that Microsoft has the incentive and ability to foreclose its rivals in the Relevant Markets, *see* PPFF §§ IV.A.–C.

2. Harm to Innovation in the Relevant Markets

98. Anticompetitive harm under Section 7 includes harm to innovation. *See Otto Bock*, 2019 WL 5957363, at *2 (finding that the acquisition “is likely to cause future anticompetitive effects in the form of higher prices and less innovation”); *Polypore Int’l, Inc.*, 2010 FTC LEXIS 17, at *281–82, 552 (F.T.C. Mar. 1, 2010) (Chappell, A.L.J.) (finding that in one market “innovation competition has been eliminated post-acquisition” and another in which innovation has been impacted); *R.R. Donnelley & Sons Co.*, No. 9243, 1995 WL 17012641, at *73 (F.T.C. July 21, 1995) (competitive harm under Section 7 may “include

a prediction of adverse effects in competitive dimensions other than price—reductions in output, product quality, or innovation”); *see also Horizontal Merger Guidelines* § 6.4 (explaining that harm to innovation can be an anticompetitive effect of a merger). In fact, in *United States v. AT&T, Inc.*, the D.C. Circuit explained that it “does not hold that quantitative evidence of price increase is required in order to prevail on a Section 7 challenge. Vertical mergers can create harms beyond higher prices for consumers, including decreased product quality and reduced innovation.” 916 F.3d 1029, 1045–46 (D.C. Cir. 2019).

99. In addition, the Federal Trade Commission has recognized the special importance of protecting competition in nascent markets, such as Cloud Game Subscription Services are here:

While monopolies are to be abhorred wherever they appear, it is of particular importance that they be arrested in an infant industry which appears destined for far greater expansion and growth. Strong and vigorous competition is the catalyst of rapid economic progress. Any lessening of competition is therefore doubly harmful in a new industry since its inevitable effect is to slow down the growth rate of the industry. *Union Carbide Corp.*, 59 F.T.C. 614, 1961 WL 65409, at *35 (Sept. 25, 1961).

100. That the market may be an emerging one poised for rapid growth might make it particularly susceptible to antitrust harm. *Bazaarvoice*, 2014 WL 203966 at *76 (“rapid technological progress may provide a climate favorable to increased concentration of market power rather than the opposite.”) (quoting *Greyhound Computer Corp., Inc. v. Int’l Bus. Machines Corp.*, 559 F.2d 488, 497 (9th Cir. 1977)).

101. The Proposed Acquisition has a reasonable probability of harming innovation competition in the Relevant Markets. *See* (PPFF § IV.D.3).

F. Defendants Fail to Meet their Burden to Show Entry Will Be Timely, Likely, and Sufficient to Counteract the Competitive Harm from the Proposed Acquisition

102. At the administrative merits hearing, Defendants will bear the burden of providing evidence that “ease of entry” rebuts Plaintiff’s *prima facie* case. *Otto Bock*, 2019 WL 5957363, at *12 (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 n.7 (D.C. Cir. 2001);

1 *see also H&R Block*, 833 F. Supp. 2d at 73 (noting that defendants “carry the burden to
 2 show” that entry or expansion is sufficient “to fill the competitive void” that would result
 3 from the merger) (internal quotations omitted). At this preliminary stage, Defendants
 4 would need to go further and leave “no doubt.” *Whole Foods Mkt.*, 548 F.3d at 1035.

5 103. “The mere existence of potential entrants does not by itself rebut the anti-
 6 competitive nature of an acquisition.” *Chi. Bridge & Iron Co N.V. v. FTC*, 534 F.3d 410,
 7 436 (5th Cir. 2008).

8 104. Entry or expansion must be “‘timely, likely, and sufficient in its magnitude,
 9 character, and scope’ to counteract a merger’s anticompetitive effects.” *United States v.*
 10 *Anthem, Inc.*, 236 F. Supp. 3d 171, 222 (D.D.C. 2017) (citations omitted).

11 105. In assessing whether entry is likely, courts often look to the history of entry,
 12 including the “inability of new firms to gain traction,” to assess “how difficult it is for
 13 new entrants to compete on the same playing field as the merged firm.” *Anthem*, 236 F.
 14 Supp. 3d at 222–24 (dismissing Dr. Robert Willig’s “breezy assurances” that developing
 15 a provider network is “not a big barrier to entry or expansion”) (citations and quotations
 16 omitted).

17 106. Defendants have not shown that entry is timely, likely, and sufficient and thus, fail
 18 to demonstrate that it would counteract the competitive harm from the Proposed
 19 Acquisition. *See* PPFF § IV.E.1.

20
 21 **G. Defendants Fail to Meet their Burden to Demonstrate That Their Proposed**
 22 **Efficiencies and Any Other Alleged Procompetitive Benefit Offset the**
 23 **Competitive Harm**

24 107. In the administrative merits proceeding, the stronger the *prima facie* case “the
 25 greater [Defendants’] burden of production on rebuttal.” *Polypore*, 2010 WL 9549988 at
 26 *9; *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001); *Baker Hughes*,
 27 908 F.2d at 991.

28 108. “The Supreme Court has never expressly approved an efficiencies defense to a §
 7 claim.” *Saint-Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d

775, 788–89 (9th Cir. 2015). To the contrary, the Court has repeatedly “cast doubt” on such a defense. *Saint-Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 788–89 (9th Cir. 2015). And this Circuit “remain[s] skeptical about the efficiencies defense in general and about its scope in particular.” *Saint-Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 790 (9th Cir. 2015).

109. To the extent they are valid at all, efficiencies cannot be based on self-serving testimony or the estimates of business executives but must be “reasonably verifiable by an independent party.” *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *59 (F.T.C. Mar. 31, 2023) (citing *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 72–73 (D.D.C. 2018)); see also *United States v. Bertelsmann SE & Co. KGaA*, No. CV 21-2886-FYP, 2022 WL 16949715, at *35 (D.D.C. Nov. 15, 2022) (finding “defendants had failed to verify the efficiencies” and therefore the court did not consider the evidence).

110. Even assuming the validity of the efficiencies defense, Defendants would bear the burden of producing “clear evidence showing that the merger will result in efficiencies that will *offset* the anticompetitive effects and ultimately benefit consumers.” *Otto Bock*, 2019 WL 2118886, at *50 (Chappell, A.L.J.) (citing *Penn State Hershey*, 838 F.3d at 350) (emphasis added); see also *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 175–76 (3d Cir. 2022). In assessing such efficiency claims, courts have applied strict standards in their review. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720–21 (D.C. Cir. 2001); *H&R Block*, 833 F. Supp. 2d at 89.

111. No court has held that efficiencies could immunize an otherwise anticompetitive merger from a §13(b) preliminary injunction. See *Otto Bock Healthcare North America, Inc.*, Dkt. No. 9378, 2019 WL 2118886, at *50 (F.T.C. May 6, 2019) (Chappell, A.L.J.) (observing that “[r]esearch does not reveal a case that permitted an otherwise unlawful transaction to proceed based on claimed efficiencies.”); *United States v. Anthem*, 855 F.3d 345, 353 (D.C. Cir. 2017) (“[I]t is not at all clear that [efficiencies] offer a viable legal defense to illegality under Section 7.”) (citing *FTC v. Procter & Gamble Co.*, 386 U.S.

568, 580, (1967) (“Possible economies cannot be used as a defense to illegality.”)); *FTC v. Penn State Hershey*, 838 F.3d 327, 347–48 (3rd Cir. 2016) (“Contrary to endorsing [an efficiencies] defense, the Supreme Court has instead, on three occasions, cast doubt on its availability Based on [the Supreme Court’s past statements] and on the Clayton Act’s silence on the issue, we are skeptical that such an efficiencies defense even exists.”) (citations omitted).

112. Courts that do assess such efficiency claims, have applied strict standards in their review. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720–21 (D.C. Cir. 2001); *H&R Block*, 833 F. Supp. 2d at 890. Specifically, “the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those ‘efficiencies’ represent more than mere speculation and promises about post-merger behavior.” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721 (D.C. Cir. 2001); *see also FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 72 (D.D.C. 2018); *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 72–73 (D.D.C. 2009).

113. Assuming *arguendo* that the efficiency defense is even potentially available, Defendants would bear the heavy burden to show that their efficiencies claims are cognizable, meaning that they are “merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.” *Horizontal Merger Guidelines* § 10; *see also FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 176 (3d Cir. 2022); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720–21 (D.C. Cir. 2001); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 137 n.15 (D.D.C. 2016); *Sysco*, 113 F. 3d Supp. at 81–82.

114. To substantiate each efficiency, Defendants would be required to demonstrate that “it is possible to ‘verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firms’ ability and incentive to compete, and why each would be merger specific.” *Otto Bock*, 2019 WL 2118886, at *50 (Chappell, A.L.J.)

(citing *H&R Block*, 833 F. Supp. 2d at 89); see also *Hackensack*, 30 F.4th 166-67; *Horizontal Merger Guidelines* § 10.

115. To demonstrate merger specificity, Defendants would need to show that the claimed efficiencies “represent a type of cost saving that could not be achieved without the merger.” *Wilhelmsen*, 341 F. Supp. at 72; see also *Hackensack*, 30 F.4th at 176 (“i.e., the efficiencies cannot be achieved by either party alone”).

116. Even verifiable, merger-specific efficiencies are no defense absent “clear evidence” that they “will offset the anticompetitive effects and ultimately benefit consumers.” *Otto Bock*, 2019 WL 2118886, at *50 (Chappell, A.L.J.) (citing *Penn State Hersey*, 838 F.3d at 350). “The critical question raised by the efficiencies defense is whether the projected savings from the mergers are enough to overcome the evidence that tends to show that possibly greater benefits can be achieved by the public through existing, continued competition.” *Cardinal Health*, 12 F. Supp. 2d at 63; see also *Anthem*, 855 F.3d at 355–56 (affirming district court’s rejection of the efficiencies defense “because the amount of cost saving that is both merger-specific and verifiable would be insufficient to offset the likely harm to competition”); *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 918 (E.D. Mo. 2020) (“[E]ven granting Defendants every dollar of their claimed efficiencies . . . and making the implausible assumption that they would pass every penny of those efficiencies on to their customers, Defendants’ claimed efficiencies still would not offset the likely competitive harm to those same customers.”).

117. Where, as here, Defendants have failed to produce evidence that merger-specific, verifiable efficiencies will “neutralize if not outweigh the harm caused by the loss of competition and innovation,” *Anthem*, 855 F.3d at 369 (Millett, J., concurring), the purported efficiencies defense fails. See PPFF § IV.E.2.

118. Defendants cannot reliably quantify the claimed value of any efficiency resulting from the Proposed Acquisition. See PPFF § IV.E.2.

119. Defendants have also failed to demonstrate that their claimed efficiencies are merger specific. See PPFF § IV.E.2.

120. Defendants also have not met their burden to show that efficiencies would be passed through to consumers. *See* PPFF § IV.E.2.

121. Defendants have failed to demonstrate efficiencies would offset the harm from this anticompetitive acquisition. *See* PPFF § IV.E.2.

H. Proposed Remedies Are Irrelevant in a § 13(b) Proceeding

122. “Likelihood of success on the merits” means on the “antitrust merits” in the administrative proceeding. *See FTC v. Meta Platforms Inc.*, No. 5:22-cv-04325-EJD, 2022 WL 16637996, at *6 (N.D. Cal. Nov. 2 2022).

123. The agreements Microsoft signed with third parties in an attempt to allay antitrust concerns in this matter constitute a proposed remedy. *See Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *48–51 (F.T.C. Mar. 31, 2023) (finding an agreement “cobbled together well after the Acquisition was announced,” contingent on the Proposed Acquisition closing and unimplemented when the merger was consummated, to be a proposed remedy “crafted in anticipation of legal concerns about the Acquisition”).

124. The Supreme Court has indicated that it is proper to consider proposed remedies only at the remedy stage, not during the initial determination of whether a statutory violation exists at all. *See United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 556 (1971) (courts do not “reach the question of remedy” if there is “no violation of § 7”); *see also Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *51, 74 (F.T.C. Mar. 31, 2023).

125. The “narrow” purpose of a § 13(b) proceeding does not extend even to the initial question of liability, *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1164 (9th Cir. 1984) (“Our present task is not to make a final determination on whether the proposed merger violates Section 7”), let alone to the subsequent question of what remedy might be appropriate if the administrative proceeding ultimately yields a finding of liability. *See FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1345 (4th Cir. 1976) (holding FTC was “entitled to preserve the status quo pending adjudication” regardless of what “ultimate

remedy” might eventually be deemed appropriate); *see also* *FTC v. ProMedica Health Sys.*, No. 3:11-cv-47, 2011 WL 1219281, at *61-64 (N.D. Ohio Mar. 29, 2011) (“[A] principal reason for preliminary relief is to prevent interim harm to consumers while the merits trial and any appeals are underway, even if a suitable divestiture remedy could later be devised.”).

126. Even if Defendants’ preferred remedy were relevant to a § 13(b) proceeding, it would be as part of Defendants’ rebuttal burden, not part of the FTC’s initial burden. *Illumina, Inc., & Grail, Inc.*, No. 9401, 2023 WL 2823393, at *51 (F.T.C. Mar. 31, 2023). As such, the proposed remedy would need to dispel any and all substantial doubts and serious questions about the transaction’s legality. *See Warner Commc’ns*, 742 F.2d at 1162; *Whole Foods Mkt.*, 548 F.3d at 1035.; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001). Defendants have failed to demonstrate their proposed remedies would offset the harms. *See* PPFF § IV.F.

127. In any event, the Supreme Court has instructed that “all doubts as to the remedy are to be resolved in [the government’s] favor.” *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961)).

I. Temporary Relief to Preserve the Status Quo is in the Public Interest

128. “When the Commission demonstrates a likelihood of ultimate success, a countershooting of private equities alone does not justify denial of a preliminary injunction.” *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984) (citing *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981)).

129. Public equities include “effective enforcement of the antitrust laws” and ensuring the Commission’s ability to obtain adequate relief if it ultimately prevails on the merits. *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1225 (11th Cir. 1991). “[T]he preservation of competition is always in the public interest.” *United States v. Tribune Publ’g Co.*, No. CV 16-01822-AB, 2016 WL 2989488, at *5 (C.D. Cal. Mar. 18, 2016).

130. In weighing the equities under § 13(b), “public equities receive far greater weight.” *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984). *See also United States v. Tribune Publ’g Co.*, No. CV 16-01822-AB, 2016 WL 2989488, at *5 (C.D. Cal. Mar. 18, 2016). (“That the government enforces antitrust law on behalf of the public interest necessarily weighs heavily in the balance-of-hardships calculus.”)

131. Since there are “substantial doubts” regarding the Proposed Acquisition’s legality, *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008), the Government has demonstrated a likelihood of ultimate success. As a result, the public interest favors granting temporary relief under § 13(b) to preserve the status quo pending the administrative adjudication.

132. Defendants’ assertion “that a preliminary injunction would force them to abandon” their proposed transaction is a private equity at best, and “private equities alone do not outweigh the Commission’s showing of likelihood of success.” *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984).

133. The only “injury” here is to Defendants themselves, and it would result solely from their own contract’s termination date—which they voluntarily agreed upon and could presumably extend if they wish. “[A]lthough the court recognizes the time, resources, and effort that Defendants have put into planning this transaction, the parties’ stated intention to abandon the transaction prior to the merits proceeding is a private equity and cannot on its own overcome the public equities that favor the FTC.” *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 73–74 (D.D.C. 2018); *see also FTC v. Whole Foods Mkt.*, 548 F. 3d 1028, 1041 1042 (D.C. Cir. 2008) (remanding to district court to determine the equities but instructing the court to “remember that a ‘risk that the transaction will not occur at all,’ by itself, is a private consideration that cannot alone defeat the preliminary injunction”); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1345–46 (4th Cir. 1976); *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 791 (N.D. Ill. 1978).

134. Defendants’ speculation that divestiture may still be “possible” after the administrative proceeding, *Oppo Br.* at 4, is a non sequitur. *See Warner Commc’ns Inc.*,

742 F.2d at 1165 (rejecting defendants’ argument “that effective relief would still be possible” following the administrative proceeding).

135. Congress intended temporary relief under § 13(b) to be “readily available to preserve the status quo while the FTC develops its ultimate case.” *FTC v. Whole Foods Mkt. Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008). It is appropriate here.

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Respectfully submitted,

/s/ James H. Weingarten

James H. Weingarten
Peggy Bayer Femenella
James Abell
Cem Akleman
J. Alexander Ansaldo
Michael T. Blevins
Amanda L. Butler
Nicole Callan
Maria Cirincione
Kassandra DiPietro
Jennifer Fleury
Michael A. Franchak
James Gossman
Ethan Gurwitz
Meredith R. Levert
David E. Morris
Merrick Pastore
Stephen Santulli
Edmund Saw

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Tel: (202) 326-3570

Erika Wodinsky

Federal Trade Commission
90 7th Street, Suite 14-300
San Francisco, CA 94103

Counsel for Plaintiff Federal Trade Commission